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Supreme Court, U.S.
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No. 93-___

In The

Supreme Court of the United States

October Term, 1993

STERLING SUFFOLK RACECOURSE LIMITED PARTNERSHIP,

Petitioner,

v.

BURRILLVILLE RACING ASSOCIATION, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the provision of an express statutory remedy for only some of the parties "especially benefitted" by a statute, within the meaning of *Cort v. Ash*, 422 U.S. 66 (1975), should preclude the inference of an implied right of action for an omitted party, where the omitted party's express statutory rights are otherwise wholly unenforceable and there is no evidence of legislative intent to preclude a remedy.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Sterling Suffolk Racecourse Limited Partnership petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the First Circuit is reported at 989 F.2d 1266. The opinion of the United States District Court for the District of Rhode Island is reported at 802 F. Supp. 662.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 25, 1993. The First Circuit denied a timely petition for rehearing en banc on April 29, 1993. On July 7, 1993, Justice David H. Souter granted an extension of time to file this petition to and including September 17, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case concerns the construction of the Interstate Horseracing Act of 1978 ("IHA"), 15 U.S.C. §§ 3001-3007, the full text of which is set out in the appendix.

STATEMENT OF THE CASE

This case presents the question whether the omission of an especially benefitted party from the remedial scheme of a statute precludes the inference of a right of action in that party's favor, where the statute provides no other mechanism for enforcement of that party's right. Both of the lower courts answered this question affirmatively. The decision of the lower courts to presume congressional intent not to confer a right of action is inconsistent with the decisions of this Court, which require an inquiry into congressional intent. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979). The application of such a presumption prevents real evaluation of congressional intent and leads inevitably to

decisions that controvert statutory purpose. Here, for example, the First Circuit decided that Congress had intentionally granted petitioner a carefully-defined, but entirely unenforceable right.

The facts are undisputed. Petitioner, Sterling Suffolk Limited Racecourse Partnership ("Sterling"), conducts live horseracing at Suffolk Downs, a thoroughbred racetrack located in Boston, Massachusetts. Respondent, Burrillville Racing Association, Inc. ("Lincoln"), conducts live greyhound racing and accepts interstate wagers on simulcast thoroughbred horseracing at Lincoln Greyhound Park in Lincoln, Rhode Island. Because it accepts interstate wagers on horseracing, Lincoln is an "offtrack betting office" within the meaning of the IHA, 15 U.S.C. § 3002(8). When Sterling conducts live racing, it is a "currently-operating track." 15 U.S.C. § 3002(14). An offtrack betting office is required to obtain the consent of any "currently operating track" within 60 miles before it may accept interstate wagers. 15 U.S.C. § 3004(b)(1). Lincoln is located approximately 50 miles from Suffolk Downs and regularly accepts interstate wagers on simulcast races during the same times of day that Sterling conducts live racing.

Lincoln has never obtained Sterling's consent to its acceptance of wagers on simulcast horseraces at Lincoln. Accordingly, at those times when Sterling is conducting live racing, Lincoln accepts interstate wagers in plain violation of the IHA. 15 U.S.C. § 3003. Lincoln acknowledges its continuing violation of the express terms of the governing federal statute, but maintains that no one may obtain a remedy for its failure to comply with the statute.

Faced with Lincoln's refusal to comply with the statute, Sterling brought this action seeking damages and an injunction against Lincoln's violation of the IHA. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (general federal question jurisdiction).

Although the IHA specifies judicial remedies for other entities with IHA approval rights, *see* 15 U.S.C. §§ 3005-3007, it fails to provide a remedy for "currently operating" tracks. *Id.* Sterling argued that it was entitled to judicial relief, nonetheless, under this Court's implied right of action doctrine. *See Cort v. Ash*, 422 U.S. 66 (1975). Sterling argued that the unambiguous statutory grant of an approval right demonstrated Congress' intention that no "currently operating" track should face direct competition from an off-track betting office within 60 miles without its express consent. Refusing to infer a right of action would completely thwart that statutory scheme. Sterling maintained that the careful limitation of its approval right through intricate exceptions and definitional provisions, *see* 15 U.S.C. § 3004(b)(1); *id.* § 3002(14), demonstrated that Congress intended that the approval rights of "currently operating" tracks be enforceable and not merely hortatory. Both sides agreed that there was no evidence anywhere in the legislative history that Congress intended to deprive "currently operating" tracks of a remedy.

Applying the test established in *Cort*, 422 U.S. at 78, and its progeny, the district court and the court of appeals held that Sterling was not entitled to an implied right of action. The district court held that the statute did not especially benefit what it called "60-mile tracks," that the remedies available to other parties indicated that

Congress did not intend that 60-mile tracks have a right of action, and that 60-mile tracks could persuade others to block the acceptance of wagers at an off-track betting office that violated the IHA. *See* 35a-41a.[1] Accordingly, it held that Sterling could not obtain any relief for Lincoln's violation of the statute.

Sterling appealed. Although it rejected a central component of the lower court's reasoning, the United States Court of Appeals for the First Circuit affirmed the district court's decision. The First Circuit held that the grant of the approval right "adequately evinced congressional intent to safeguard the interests of 60-mile tracks and, therefore, must be viewed as redounding to their especial benefit. The legislative history fortified this conclusion." 19a. Nevertheless, the First Circuit refused to infer a right of action in Sterling's favor, adopting instead a presumption that the exclusion of "currently operating" tracks from the enforcement provisions of the IHA reflected congressional intent to deprive "currently operating" tracks of a remedy. "When a statute expressly provides remedies, courts must be extremely reluctant to expand its sweep by augmenting the list of prescribed anodynes. To the exact contrary, a court confronted with such a situation *should ordinarily conclude* that the legislature provided precisely the redress it considered appropriate." 20a (emphasis added). The First Circuit concluded that Sterling's status as an especial beneficiary did not overcome the negative inference drawn from its omission from the remedial provision. Thus, it held that the

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[1] Citations to " ___ a" refer to the appendix to this petition.

approval right granted to 60-mile tracks was unenforceable.

REASONS FOR GRANTING THE WRIT

The decision below raises a fundamental interpretive problem that requires this Court's attention. The First Circuit's approach challenges the continued validity of the implied right of action doctrine. By presuming intention from omission, the First Circuit reached the anomalous conclusion that Congress intended to confer a significant right and yet make it unenforceable. The First Circuit's presumption eschews analysis of legislative history and mechanically resolves the conflict between the substantive and remedial provisions of a statute, which exists in every implied right of action case, by allowing the omission of a party from the remedial provision to control. This elevation of the importance of remedial provisions is inconsistent with the emphasis on legislative intent stated in *Cort* and all of its progeny. Finally, although the First Circuit is the only appellate court to have construed the IHA, the 60-mile track approval provisions of the statute are of vital importance to the thoroughbred and horseracing industries. The enormous increase in interstate wagering on simulcast horseracing over the last several years now raises the threat to live horseracing that motivated the passage of the IHA. A decision to defer this issue would do irreparable harm to the interests of regional horseracing tracks and to the thoroughbred industry.

I. Congressional silence should not be presumed to reflect intentional omission.

The IHA's failure to provide 60-mile tracks with an explicit remedy does not signal an intention to deny these tracks a right of action. The IHA provides express remedies for only three of the five parties granted approval rights. *Compare* 15 U.S.C. § 3004(a)-(b) *with* 15 U.S.C. § 3006. The First Circuit presumed that this under-inclusiveness reflected congressional intent to deny 60-mile tracks a remedy.

Nothing in the text of the statute or in its legislative history suggests that Congress perceived any qualitative differences or hierarchy among the approval rights conferred by the statute or among the parties benefitted by the statute. The approval of all five parties is required. Each of the other four parties benefitted by the IHA has a mechanism by which to enjoin an off-track betting office that fails to win its approval.[2] Only "currently operating" tracks are without recourse. Thus, the First Circuit presumption creates the anomaly of an "especially benefitted" party which enjoys no benefit from its statutory right.

The decisions of this Court instruct that the existence of a specified remedy for the infringement of a right should preclude the inference of an *additional* remedy for the same violation. *See Karahalios v. National Fed'n of Fed.*

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[2] The other entity excluded from the remedial provisions – the racing commission in the off-track state – typically has plenary coercive power over the off-track betting office as a matter of state law.

Employees, 489 U.S. 527, 533 (1989). Sterling does not seek an additional remedy. In the absence of an implied right of action, 60-mile tracks have no means by which to enforce their statutory approval rights. In other words, both lower courts decided that Congress, without comment, *intentionally created an unenforceable right*. The two lower courts assumed that congressional silence compelled this result. That assumption is not consistent with the decisions of this Court or with common sense. Moreover, a presumption that dictates such a result is contrary to public policy.[3]

In support of its decision, the First Circuit relied exclusively on cases in which this Court has declined to infer a right of action in favor of an especially benefitted party because the statute at issue specified some alternative means, administrative or otherwise, through which that party could obtain relief from the statutory violation at issue. *See, e.g., Karahalios*, 489 U.S. at 533; *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981); *Transamerica*, 444 U.S. at 20. In each of the cited opinions, Congress chose the means by which the wronged party could seek relief from the violation

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[3] Congress typically creates rights with the expectation that they will be enforced (if necessary) and for the purpose of furthering specific policy goals. To presume that rights are unenforceable in the absence of a specified remedy would frustrate many statutes written in the absence of such a bright-line rule. If this Court wishes Congress to work against such a background principle it should say so. Otherwise, decisions like the one at issue here will prevent statutes from fulfilling their intended purposes. *See* C. Sunstein, *After the Rights Revolution* at 222-23 (Harvard 1990).

and the plaintiff sought an *additional* remedy. The decisions in those cases reflect deference to a congressional *choice* of remedy. But here no such deference comes into play; the statute provides no mechanism at all for 60-mile tracks to enforce their approval rights. Congress decided to confer separate approval rights upon five designated entities, including 60-mile tracks, all of whom must consent before an interstate wager may lawfully be accepted. In the decisions of the courts below, this clearly-expressed congressional decision was abrogated in reliance on inapposite authority concerning the implication of additional remedies.

There is inherent danger in applying the rule of the "additional remedy" decisions to this problem. It turns a principle of deference to congressional choice into a bright-line rule against implied rights of action whenever some remedy is expressly provided for any party. It presumes that silence demonstrates congressional intent to deny a remedy. Nothing in the decisions of this Court permits such a rule. "It is not valid to say that courts have no authority to create such rights, since a judicial role here is time-honored, and *legislative silence is not plausibly taken as an implicit decision not to allow such rights.*" C. Sunstein, *After the Rights Revolution*, at 223 (Harvard 1990) (emphasis added).

II. Courts are obligated to give effect to a statute's purposes; an unenforceable right is an oxymoron.

This Court has always recognized that the strongest argument for inference of a private right of action is that a statute grants a right but fails, through oversight or

otherwise, to grant a remedy. *See Thompson v. Thompson*, 484 U.S. 174, 179 (1988).[4] The First Circuit's opinion ignores the principle that the existence of a right ordinarily compels the inference of some remedy. The First Circuit's ready acceptance of the oxymoronic concept of an unenforceable right is incompatible with the implied right of action doctrine.

The First Circuit's approach accords any remedial provision paramount importance. This approach conflicts with this Court's mandate that courts consider the whole of a statute in order to give its words their intended effect. *See, e.g., Deal v. United States*, 113 S. Ct. 1993, 1996 (1993); *King v. St. Vincent's Hospital*, 112 S. Ct. 570, 574 (1992). The approach followed below undoes the process of statutory interpretation, replacing it with the mechanical application of a maxim. Instead of considering the statute, the court of appeals considered its remedial provisions. Consideration of the statute as a whole illustrates the fallacy of the First Circuit's interpretive approach.

The text of the IHA demonstrates that Congress sought to provide 60-mile tracks with a specific and carefully delineated right. *See* 15 U.S.C. §§ 3002(14), (17), (18); *id.* 3004(b)(1)(a) and (b); *id.* § 3004(b)(2).[5] Though not

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[4] Those criteria are fulfilled by the IHA. From the perspective of Sterling and other 60-mile tracks, it is exactly as if the statute were written without any enforcement provisions at all.

[5] This right is stated in mandatory terms. The statute is structured so that the failure to obtain any one of the five required approvals renders acceptance of an interstate wager unlawful. 15 U.S.C. §§ 3003, 3004.

dispositive, this language is highly probative of congressional intent to provide a private right of action. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 145-47 (1985); *Universities Research Association v. Coutu*, 450 U.S. 754, 771-72 (1980); *Transamerica*, 444 U.S. at 17-18, 24; *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979). The textual inference is especially powerful in this case because Congress took evident care in defining the contours of the right. A 60-mile track's approval is only required when it is "currently operating" within the elaborate statutory definition; that is, when it is actually conducting live racing. *See* 15 U.S.C. § 3002 (14). No approval is required for a certain number of special events where there are at least 250 days per year of live racing in the state where the off-track betting office is located. 15 U.S.C. § 3004(b)(2). These elaborately drawn provisions limit and define the 60-mile track's approval right. Why would Congress bother to so carefully define an *unenforceable* right? There is no answer to this question except that Congress must have expected that, when applicable, the approval right would be enforceable.

Congressional intent to provide a private right of action need not be express. *Cannon*, 441 U.S. at 694 ("[T]he legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question"); *Transamerica*, 444 U.S. at 18 ("The failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available"). Thus, the court of appeals should not have required evidence that Congress *specifically* intended to confer a private right of action. As this Court explained in

Cort, "in situations in which it is *clear* that federal law has granted a class of persons certain rights, it is *not necessary to show an intention to create a private cause of action.*" 422 U.S. at 78 (emphasis added). Indeed, requiring such a specific showing of congressional intent to create a remedy would reduce the implied right of action doctrine to a device for the correction of scrivener's errors. *Thompson*, 484 U.S. at 179.

The implied right of action doctrine exists because the words of a statute do not always perfectly enact congressional intention. *Id.* "[T]he right-or-duty creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action." *Cannon*, 441 U.S. at 690 n.13. Significantly, there is no evidence anywhere in the legislative history that Congress intended to make the approval right of 60-mile tracks unenforceable.

Although the court of appeals purported to consider the statute as a whole, it only discussed the remedial sections. *See* 21a-22a. The whole of the First Circuit's analysis boils down to its starting point: the existence of a remedy for some precludes the inference of a remedy for others. Having thus come full circle, the opinion terms the omission a "striking indication of congressional intent." *Id.*

This heavy reliance on the statute's remedial provisions is directly contrary to *Cannon*'s emphasis on "right-or-duty creating language." Common sense supports *Cannon*'s lesson: specific language granting rights should compel inference of a right of action in the absence of an affirmative indication that Congress did not intend that

those rights should be enforced. This last point is central. In 1978, when this statute was enacted, Congress no doubt expected that the existence of a right implied the existence of a remedy. *See Cannon,* 441 U.S. at 696-71. If Congress had intended that the IHA work differently, one would expect some comment to that effect. There is none whatsoever in the text of the IHA or in its legislative history.

The methodical tone of the First Circuit's opinion gives the misleading impression that its holding is routine. It is emphatically not. If the First Circuit's decision stands, the IHA provides no protection for 60-mile tracks. After *Sterling,* no off-track betting office will seek the approval of a 60-mile track. In the absence of a coercive remedy, an off-track betting office has no reason to bargain for approval and every economic incentive to ignore, without consequence, a clear mandate of federal law.

III. This case is of national significance and immediate importance.

The interpretation of the 60-mile track provisions of the IHA is of enormous importance to the thoroughbred racing industry. The speculations of the First Circuit to the contrary, making the 60-mile track approval right unenforceable makes it absolutely meaningless. *See* K. Hollingsworth, *No Bargaining Power,* Thoroughbred Times (March 19, 1993).

The statute represents a compromise between two of the racing industry's most powerful lobbies: those seeking to protect live racing and those seeking to expand simulcast off-track betting. Originally introduced in 1976

as a protectionist measure prohibiting off-track betting, the 1978 law allowed the competing interests to coexist, while protecting live racing through the mechanism of the 60-mile track approval right. The legislative history contains many statements of congressional intent to protect live racing from direct competition with simulcast wagering. *Report of the House Committee on Interstate and Foreign Commerce*, H.R. Rep. No. 94-1366, 94th Cong., 2d Sess. at 1-2 (1976) ("[o]ff track parimutuel wagering on an interstate basis will result in a severe decrease in the number of racetracks, causing substantial loss of revenue to the States and serious harm to the horseracing industry"); Statement of Senator Huddleston, A. 280-82[6] ("one evil which enactment of S. 1185 [the IHA] will prevent is the proliferation of interstate wagering and the resultant demise of racing"). Congress intended the approval right to afford 60-mile tracks meaningful protection against competition from off-track betting. "With this provision, the bill provides racetracks with the means of protecting their natural market areas by impossing an additional market area consent." *Report of the Senate Judiciary Committee*, S. Rep. No. 95-1117, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 4132-4155, at 4145.

Congress recognized that thoroughbred racing depends on the viability of regional tracks like Suffolk Downs, that comprise some 75% of the live racing industry. *Report of the House Interstate Commerce Committee*, H.

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[6] Citations to "A." refer to the joint appendix, volume II of which contains the entire legislative history and is part of the record below.

Rep. No. 95-1733 at 2, 4-5 (1978). These tracks are especially vulnerable to competition from simulcast outlets, which can offer wagering on races from the premiere racetracks in the country at relatively low cost. Congress perceived that the loss of regional racing would destroy the industry.

As off-track betting expands, the threat to regional tracks increases. The IHA provisions at issue here were designed to limit and stave off that threat. The decisions below give off-track betting interests free rein to compete directly with 60-mile tracks, contrary to the plain language of the statute. Unless this Court says otherwise now, the legislature's work will have been for naught. The balance of interests created by the statute will be upset and the off-track betting interests will have won in court the battle that they lost in the Congress. The entire exercise of statutory interpretation aims at preventing such a result.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue. Alternatively, the error that permeates the First Circuit's decision makes this an appropriate case for summary reversal.

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Chapter 57 – Interstate Horseracing

Sec.

3001. Congressional Findings and Policy.

3002. Definitions.

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§ 3001. Congressional findings and policy

(a) The Congress finds that –

(1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders;

(2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests; and

(3) in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers.

(b) It is the policy of the Congress in this chapter to regulate interstate commerce with respect to wagering on horseracing, in order to further the horseracing and legal off-track betting industries in the United States.

(Pub. L. 95-515, § 2. Oct. 25, 1978, 92 Stat. 1811.)

Section 9 of Pub. L. 95-515 provided that:

"(a) The provisions of this Act [this chapter] shall take effect on the date of enactment of this Act [Oct. 25, 1978], and, except as provided in subsection (b) of this section, shall apply to any interstate off-track wager accepted on or after such date of enactment.

"(b)(1) The provisions of this Act [this chapter] shall not apply to any interstate off-track wager which is accepted pursuant to a contract existing on May 1, 1978.

"(2) The provisions of this Act shall not apply to any form of legal non-parimutuel off-track betting existing in a State on May 1, 1978.

"(3) The provisions of subsection (b) of section 5 of this Act [section 3004(b) of this title] shall not apply to any parimutuel off-track betting system existing on May 1, 1978, in a State which does not conduct parimutuel horseracing on the date of enactment of this Act [Oct. 25, 1978."

SHORT TITLE

Section 1 of Pub. L. 95-515 provided that: "This Act [enacting this chapter] may be cited as the 'Interstate Horseracing Act of 1978'."

§ 3002. Definitions

For the purposes of this chapter the term –

(1) "person" means any individual, association, partnership, joint venture, corporation, State or political subdivision thereof, department, agency, or instrumentality of a State or political subdivision thereof, or any other organization or entity;

(2) "State" means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(3) "Interstate off-track wager" means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State;

(4) "on-track wager" means a wager with respect to the outcome of a horserace which is placed at the racetrack at which such horserace takes place;

(5) "host State" means the State in which the horserace subject to the interstate wager takes place;

(6) "off-track State" means the State in which an interstate off-track wager is accepted;

(7) "off-track betting system" means any group which is in the business of accepting wagers on horseraces at locations other than the place where the horserace is run, which business is conducted by the State or licensed or otherwise permitted by State law;

(8) "off-track betting office" means any location within an off-track State at which off-track wagers are accepted;

(9) "host racing association" means any person who, pursuant to a license or other permission granted by the host State, conducts the horserace subject to the interstate wager;

(10) "host racing commission" means that person designated by State statute or, in the absence of statute, by regulation, with jurisdiction to regulate the conduct of racing within the host State;

(11) "off-track racing commission" means that person designated by State statute or, in the absence of statute, by regulation, with jurisdiction to regulate off-track betting in that State;

(12) "horsemen's group" means, with reference to the applicable host racing association,

the group which represents the majority of owners and trainers racing there, for the races subject to the interstate off-track wager on any racing day;

(13) "parimutuel" means any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the participants are wagering with each other and not against the operator;

(14) "currently operating tracks" means racing associations conducting parimutuel horseracing at the same time of day (afternoon against the afternoon; nighttime against nighttime) as the racing association conducting the horseracing which is the subject of the interstate off-track wager;

(15) "race meeting" means those scheduled days during the year a racing association is granted permission by the appropriate State racing commission to conduct horseracing;

(16) "racing day" means a full program of races at a specified racing association on a specified day;

(17) "special event" means the specific individual horserace which is deemed by the off-track betting system to be of sufficient national significance and interest to warrant interstate off-track wagering on that event or events;

(18) "dark days" means those days when racing of the same type does not occur in an off-track State within 60 miles of an off-track betting office during a race meeting, including, but

not limited to, a dark weekday when such racing association or associations run on Sunday, and days when a racing program is scheduled but does not take place, or cannot be completed due to weather, strikes and other factors not within the control of the off-track betting system;

(19) "year" means calendar year;

(20) "takeout" means that portion of a wager which is deducted from or not included in the parimutuel pool, and which is distributed to persons other than those placing wagers;

(21) "regular contractual process" means those negotiations by which the applicable horsemen's group and host racing association reach agreements on issues regarding the conduct of horseracing by the horsemen's group at that racing association;

(22) "terms and conditions" includes, but is not limited to, the percentage which is paid by the off-track betting system to the host racing association, the percentage which is paid by the host racing association to the horsemen's group, as well as any arrangements as to the exclusivity between the host racing association and the off-track betting system.

(Pub. L. 95-515, § 3, Oct. 25, 1978, 92 Stat. 1811.)

§ 3003. Acceptance of Interstate off-track wager

No person may accept an interstate off-track wager except as provided in this chapter.

(Pub. L. 95-515, § 4, Oct. 25, 1978, 92 Stat. 1813.)

§ 3004. Regulation of interstate off-track wagering

(a) Consent of host racing association, host racing commission, and off-track racing commission as prerequisite to acceptance of wager

An interstate off-track wager may be accepted by an off-track betting system only if consent is obtained from –

(1) The host racing association, except that –

(A) as a condition precedent to such consent, said racing association (except a not-for-profit racing association in a State where the distribution of off-track betting revenues in that State is set forth by law) must have a written agreement with the horsemen's group, under which said racing association may give such consent, setting forth the terms and conditions relating thereto; provided,

(B) that where the host racing association has a contract with a horsemen's group at the time of enactment of this chapter which contains no provisions referring to interstate off-track betting, the terms and conditions of said then-existing contract shall be deemed to apply to the interstate off-track wagers and no additional written agreement need be entered into unless the parties to such then-existing contract agree otherwise. Where such provisions exist in such existing contract, such contract shall govern. Where written consents exist at the time of enactment of this chapter between an off-track betting system and the host racing association providing for interstate off-track wagers, or such written consents are executed by these parties prior to the expiration of such then-existing

contract, upon the expiration of such then-existing contract the written agreement of such horsemen's group shall thereafter be required as such condition precedent and as a part of the regular contractual process, and may not be withdrawn or varied except in the regular contractual process. Where no such written consent exists, and where such written agreement occurs at a racing association which has a regular contractual process with such horsemen's group, said agreement by the horsemen's group may not be withdrawn or varied except in the regular contractual process;

(2) the host-racing commission;

(3) the off-track racing commission.

(b) Approval of tracks as prerequisite to acceptance of wager; exceptions

(1) In addition to the requirement of subsection (a) of this section, any off-track betting office shall obtain the approval of –

(A) all currently operating tracks within 60 miles of such off-track betting office; and

(B) if there are no currently operating tracks within 60 miles then the closest currently operating track in an adjoining State.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, any off-track betting office in a State with at least 250 days of on-track parimutuel horseracing a year, may accept interstate off-track wagers for a total of 60 racing days and 25 special events a year without the approval required by paragraph (1), if with respect to such 60 racing days, there is no racing of the same type at

the same time of day being conducted within the off-track betting State within 60 miles of the off-track betting office accepting the wager, or such racing program cannot be completed. Excluded from such 60 days and from the consent required by subsection (b)(1) of this section may be dark days which occur during a regularly scheduled race meeting in said off-track betting State. In order to accept any interstate off-track wager under the terms of the preceding sentence the off-track betting office shall make identical offers to any racing association described in subparagraph (A) of subsection (b)(1) of this section. Nothing in this subparagraph shall be construed to reduce or eliminate the necessity of obtaining all the approvals required by subsection (a) of this section.

(c) Takeout amount

No parimutuel off-track betting system may employ a takeout for an interstate wager which is greater than the takeout for corresponding wagering pools of off-track wagers on races run within the off-track State except where such greater takeout is authorized by State law in the off-track State.

(Pub. L. 95-515, § 5, Oct. 25, 1978, 92 Stat. 1813.)

§ 3005. Liability and damages

Any person accepting any interstate off-track wager in violation of this chapter shall be civilly liable for damages to the host State, the host racing association and the horsemen's group. Damages for each violation shall be based on the total of off-track wagers as follows:

(1) If the interstate off-track wager was of a type accepted at the host racing association,

damages shall be in an amount equal to that portion of the takeout which would have been distributed to the host State, host racing association and the horsemen's group, as if each such interstate off-track wager had been placed at the host racing association.

(2) If such interstate off-track wager was of a type not accepted at the host racing association, the amount of damages shall be determined at the rate of takeout prevailing at the off-track betting system for that type of wager and shall be distributed according to the same formulas as in paragraph (1) above.

(Pub. L. 95-515, § 6, Oct. 25, 1978, 92 Stat. 1814.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3006 of this title.

§ 3006. Civil Action

(a) Parties; remedies

The host State, the host racing association, or the horsemen's group may commence a civil action against any person alleged to be in violation of this chapter, for injunctive relief to restrain violations and for damages in accordance with section 3005 of this title.

(b) Intervention

In any civil action under this section, the host State, the host racing association and horsemen's group, if not a party, shall be permitted to intervene as a matter of right.

(c) Limitations

A civil action may not be commenced pursuant to this section more than 3 years after the discovery of the alleged violation upon which such civil action is based.

(d) State as defendant

Nothing in this chapter shall be construed to permit a State to be sued under this section other than in accordance with its applicable laws.

(Pub. L. 95-515, § 7, Oct. 25, 1978, 92 Stat. 1814.)

§ 3007. Jurisdiction and venue

(a) District Court jurisdiction

Notwithstanding any other provision of law, the district courts of the United States shall have jurisdiction over any civil action under this chapter, without regard to the citizenship of the parties or the amount in controversy.

(b) Venue; service of process

A civil action under this chapter may be brought in any district court of the United States for a district located in the host State or the off-track State, and all process in any such civil action may be served in any judicial district of the United States.

(c) Concurrent State court jurisdiction

The jurisdiction of the district courts of the United States pursuant to this section shall be concurrent with that of any State court of competent jurisdiction located in the host State or the off-track State.

(Pub. L. 95-515, § 8, Oct. 25, 1978, 92 Stat. 1814.)

United States Court of Appeals*
For the First Circuit

No. 92-2260

STERLING SUFFOLK RACECOURSE
LIMITED PARTNERSHIP,

Plaintiff, Appellant,

v.

BURRILLVILLE RACING ASSOCIATION, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

[Hon. Ronald R. Lagueux, *U.S. District Judge*]

Before
Selya, Cyr and Stahl, *Circuit Judges.*

E. Randolph Tucker, with whom *Michael D. Ricciuti*, *David B. Crevier*, *Joshua M. Davis*, and *Hill & Barlow* were on brief, for appellant.

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* The appendix to this Opinion has been omitted. The statute itself, which comprises the appendix, appears beginning at page 1a.

March 25, 1993

SELYA, *Circuit Judge.* In this appeal, we confront two issues of novel impression at the appellate level. First, we must determine whether the Interstate Horseracing Act (IHA), 15 U.S.C. §§ 3001-3007 (1988), the full text of which is set out in the appendix, contains an implied private right of action in favor of racetracks situated within sixty miles of a display track, *i.e.*, a track that accepts interstate off-track wagers on races to be run at distant tracks and then simulcasts the actual races. Second, we must determine whether certain alleged violations of the IHA comprise a pattern of racketeering activity falling within the ambit of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1988 & Supp. III 1991). Believing, as we do, that the court below correctly answered both inquiries in the negative, we affirm.

I. AT THE STARTING GATE

The relevant facts are not in dispute. Plaintiff appellant Sterling Suffolk Racecourse Limited Partnership (Suffolk) conducts live horseracing at Suffolk Downs, a track in the metropolitan Boston area. Approximately fifty miles away, in Lincoln, Rhode Island, defendant-appellee Burrillville Racing Association, Inc. (Lincoln) operates a greyhound track (Lincoln Greyhound Park) and an off-track betting (OTB) office, *see* 15 U.S.C. § 3002(8), for, *inter alia*, accepting interstate off-track wagers, *see* 15 U.S.C. § 3002(3). This means, in short, that

Lincoln accepts bets on horseraces to be run at distant tracks and, employing telephone and wire linkages, effectively places these wagers in the host track's parimutuel pool. When a race is run, closed circuit television transmission enables Lincoln's patrons to witness it. Lincoln then settles with the bettors, pays a percentage to the host track, and retains the balance.

While this form of wagering is legal under the relevant laws of all states involved here, 15 U.S.C. § 3004(a) prohibits such wagering at OTB offices unless three parties consent: (1) the track which conducts the live race; (2) the racing commission having jurisdiction to regulate racing within the state where the live race occurs; and (3) the racing commission having jurisdiction over race wagering in the state where the simulcast occurs.[1] The host racing association, in turn, must obtain the consent of the trade association representing the owners of horses running in the live race before signalling its acquiescence.[2] *See id.* Lincoln procures the consent of these parties for every race on which it accepts wagers.

A separate subsection of the IHA also requires OTB offices to obtain the approval of "all currently operating tracks within 60 miles" or, if there are no such tracks, "the closest currently operating track in an adjoining State," 15

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[1] In the parlance of the IHA, these three entities are called the "host racing association," "host racing commission," and "offtrack racing commission," respectively. *See* 15 U.S.C. § 3002(9)-(11). We refer the reader to the statutory appendix for more precise definitions of each term.

[2] The trade association is called the "horsemen's group." *See* 15 U.S.C. § 3002(12).

U.S.C. § 3004(B)(1), before accepting interstate off-track wagers. It is no secret that Lincoln regularly violates this provision by accepting wagers against Suffolk's wishes.[3]

Disgruntled at being shut out in this fashion, Suffolk sued Lincoln in the United States District Court for the District of Rhode Island. It sought to curtail Lincoln's practice of accepting wagers on races run at out-of-state tracks. Suffolk advanced two theories, asseverating that Lincoln's activities transgressed the IHA and also constituted a pattern of indictable activity under federal gambling laws, *see, e.g.*, 18 U.S.C. § 1084(a) (1988), and, therefore, justified injunctive relief under RICO. *See* 18 U.S.C. §§ 1961(1), 1962(a). The district court rejected this two-pronged assault. It held that Suffolk lacked standing to assert a claim under the IHA and that Lincoln's acceptance of interstate off-track wagers without Suffolk's blessing was not the stuff from which a RICO suit could be fashioned. *See Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass'n. Inc.*, 802 F. Supp. 662, 669-71 (D.R.I. 1992). Hence, the district court denied Suffolk's prayer for injunctive relief and granted Lincoln's motion for summary judgment. *Id.* at 673. This appeal ensued.

II. OFF AND RUNNING

We devote our initial explicatory efforts to the leading question in the case: Does the IHA give so-called "60-

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[3] In December 1991, Lincoln sought Suffolk's approval, but made no sufficiently spectacular bid. Hence, the parties failed to reach an accord.

mile tracks," *i.e.*, tracks operating within sixty miles of an OTB office, an implied right of action for injunctive relief? Because this issue is purely legal, we consider it *de novo*. *See. e.g., Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 757 (1st Cir. 1992).

In determining whether a private cause of action is implied in a federal statute, a court's central focus must be on congressional intent. *See, e.g., Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 532-33 (1989) ("Unless . . . congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.") (citation and internal quotation marks omitted); *Stowell v. Ives*, 976 F.2d 65, 70 n.5 (1st Cir. 1992) ("There is a presumption against implied rights of action – a presumption that will endure unless the plaintiff proffers adequate evidence of a contrary congressional intent."). To discern this intent, courts employ the customary tools of statutory interpretation, *see, e.g., Thompson v. Thompson*, 484 U.S. 174, 179 (1988); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979), frequently asking, however, three questions which often have special salience in connection with implied rights of action. These queries are: (1) Is the plaintiff one of the class for whose especial benefit the legislation was enacted? (2) Is the remedy sought consistent with the underlying purposes of the legislative scheme? (3) Is the cause of action one traditionally relegated to state law? *See Thompson*, 484 U.S. at 179; *Cort v. Ash*, 422 U.S. 66, 78

(1975); *Latinos Unidos de Chelsea v. Secretary of HUD*, 799 F.2d 774, 792 (1st Cir. 1986).[4]

Here, the district court followed this roadmap expertly. *See Sterling*, 802 F. Supp. at 666-69. Its opinion is astute. Its views are articulated with clarity and precision. It builds upon other persuasively reasoned caselaw reaching the identical result. *See. e.g., New Suffolk Downs Corp. v. Rockingham Venture, Inc.*, 656 F. Supp. 1190, 1194 (D.N.H. 1987). Under these auspicious circumstances, we see no need to reinvent the wheel. Rather, we affirm the lower court's holding that the IHA implies no private right of action in favor of 60-mile tracks for essentially the reasons elucidated in the opinion below. We pause, however, to add some observations and clarifications.

First: Although we concur in Judge Lagueux's bottom-line assessment that the IHA does not give 60-mile tracks a private right of action, and in his related evaluation of two of the three *Cort* factors – the remedy that Suffolk seeks seems to be at odds with the IHA's underlying purposes and the cause of action questions what activities may lawfully be carried out at a state-regulated gambling facility, a matter traditionally relegated to state law – we think it is advisable to begin by remarking a

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[4] To be sure, the *Cort* Court also asked a fourth question: Is there evidence of legislative intent to create or deny a private right of action? *See Cort*, 422 U.S. at 78; *see also Latinos Unidos*, 799 F.2d at 792. The Justices have since made clear, however, that the fourth question is really a tote board for tallying the answers to all the other inquiries and, therefore, need not be considered separately. *See Thompson*, 484 U.S. at 179; *California v. Sierra Club*, 451 U.S. 287, 293 (1981); *see also Royal Business Group, Inc. v. Realist, Inc.*, 933 F.2d 1056, 1060 (1st Cir. 1991).

point of disagreement. Unlike Judge Lagueux, 802 F. Supp. at 667, we believe Congress, even though it did not choose to confer a private right of action, *see infra*, nevertheless designed section 3004(b)(1)(A) for the benefit of 60-mile tracks. *See Cort*, 422 U.S. at 78; *see also Royal Business Group, Inc. v. Realist, Inc.*, 933 F.2d 1056, 1061-62 (1st Cir. 1991) (discussing "especial benefit" test).

The especial benefit inquiry in implied right of action cases need not be a search for a single class of plaintiffs – the class which the entire statute is most directed toward assisting. Rather, different parts of a statutory scheme can be aimed at benefitting different classes of persons. *See, e.g., Cohen v. Massachusetts Bay Transp. Auth.*, 647 F.2d 209, 212 (1st Cir. 1981) (noting that a particular section of a statute primarily benefitted consumers while a different section of the same statute primarily benefitted transit workers); *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 705 (1st Cir. 1977) (discussing a statute that especially benefitted two separate groups). The inquiry, then, focuses on whether *any* language in the statute sufficiently indicates a motivating congressional purpose to benefit the class in question as opposed to, say, a mere congressional expression of knowledge anent, or passive approval of, a tangential benefit. *See California v. Sierra Club*, 451 U.S. 287, 294 (1981); *Cannon v. University of Chicago*, 441 U.S. 677, 690-94 (1979). Properly conducted, this type of investigation weeds out statutes which protect a general public interest and only incidentally create advantages for particular people. *See, e.g., Cannon*, 441 U.S. at 690; *Arroyo-Torres v. Ponce Fed. Bank*, 918 F.2d 276, 278 (1st Cir. 1990).

When we shine the light of this understanding on the IHA, we think that 60-mile tracks meet the "especial benefit" criterion. Section 3004(b)(1)(A) requires an OTB office to procure the approval of all 60-mile tracks before accepting interstate off-track wagers. This requirement, by its own terms, adequately evinces congressional intent to safeguard the interests of 60-mile tracks and, therefore, must be viewed as redounding to their especial benefit. The legislative history fortifies this conclusion. *See, e.g.*, S. Rep. No. 1117, 95th Cong., 2d Sess. 4-5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4144, 4147-48. No more is exigible. *See Cannon*, 441 U.S. at 690-94 (finding especial benefit conferred by language more general than that contained in the IHA).

Still, we hasten to add that this fact alone does not strike the gold. In this case, the especial benefit element is at most a dim counterpoint to the bold-faced evidence of congressional intent intricately interwoven into the IHA's language and structure. Therefore, the district court's miscalculation constitutes harmless error.

Second: We turn now to the other indicators of legislative intent. It is a familiar precept that, in cases of statutory interpretation, the language of the statute enjoys preeminence. *See Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 91 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16; *Touche Ross*, 442 U.S. at 568. Here, notwithstanding the especial benefit point, the words of the statute speak strongly against implying a private right of action. We explain briefly.

When a statute expressly provides remedies, courts must be extremely reluctant to expand its sweep by augmenting the list of prescribed anodynes. To the exact contrary, a court confronted with such a situation should ordinarily conclude that the legislature provided precisely the redress it considered appropriate. *See, e.g., Karahalios,* 489 U.S. at 533 (collecting cases); *Middlesex County Sewerage Auth. v. Sea Clammers,* 453 U.S. 1, 14-15 (1981); *Nashoba Communications, Ltd. v. Town of Danvers,* 893 F.2d 435, 440 (1st Cir. 1990). This is such a case. The IHA explicitly identifies the parties entitled to bring actions for damages or injunctions, *see* 15 U.S.C. § 3006 – and 60-mile tracks are not among them. When discussing the potential liability of violators and outlining the damages they must pay, the IHA identifies as potential recipients of damage awards only these same parties. *See* 15 U.S.C. § 3005. And, moreover, the statute employs a damage calculation formula, *see id.*, that is totally irrelevant to entities like 60-mile tracks. It strains credulity to argue that these serial omissions are serendipitous.

The IHA's venue and jurisdictional provisions point in the same direction. The statute provides that venue is appropriate only in a district in which either the host track or the display track is located. *See* 15 U.S.C. § 3007(b). It further provides that jurisdiction is appropriate only in the courts of the host state or the off-track state.[5] *See* 15 U.S.C. § 3007(c). In particular contexts, a statute's silence can be informative. So it is here: the

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[5] The "off-track State" is the state in which the "interstate off-track wager is accepted." 15 U.S.C. § 3002(6).

absence of any provision for venue or jurisdiction based on the location of an aggrieved 60-mile track tells a tale.

In sum, given the language of the statute – what the IHA says and what it shies away from saying – there is no sure footing for the implication of a private right of action favoring non-consenting 60-mile tracks.

Third: The structure of a statute can also be of inestimable value in its interpretation. *See Crandon v. United States*, 110 S. Ct. 997, 1001 (1990); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 824 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993). In this instance, the statute's structure seems highly significant. The provision requiring OTB offices to secure the approbation of the horsemen's group, host racing association, host racing commission, and off-track racing commission is set conspicuously apart from the provision requiring display tracks to seek the approval of 60-mile tracks. *Compare* 15 U.S.C. § 3004(a) *with* 15 U.S.C. § 3004(b).

The language of the statutory provisions bolsters the conclusion that these structural differences are pregnant with meaning. Congress phrased the former provision as an absolute condition precedent to off-track wagering across state lines, *see* 15 U.S.C. § 3004(a) (an "interstate off-track wager may be accepted by an off-track betting system *only if* consent is obtained from [four entities]") (emphasis supplied), but phrased the latter provision merely as a directive to a private party. *See* 15 U.S.C. § 3004(b)(1) ("any off-track betting office shall obtain the approval of [tracks within a 60-mile radius]"). As the Court has indicated, a statutory provision phrased as a command to specific people, like the one upon which

Suffolk rests its hopes, is unlikely to breed an implied private right of action because such language usually evinces a congressional concern with instructing the putative violator rather than with providing a remedy to the putative victim. *See, e.g., Universities Research Ass'n v. Coutu*, 450 U.S. 754, 772-73 & n.23 (1981); *Cannon*, 441 U.S. at 690-93.

Fourth: In this case, the whole is certainly no less than the sum of its constituent parts. The language of almost every section of the IHA, and the structure of the pivotal provisions, strongly suggest that Congress did not intend to provide disapproving 60-mile tracks with a private right of action against display tracks. Having discerned so striking an indication of congressional intent, deeply rooted in the text of the statute itself, we find Suffolk's reliance on fragmentary excerpts from the legislative history to be little more than grains of desert sand in the teeth of a haboob. Even clear legislative history – and the history here is less than pellucid – must yield to a contrary implication easily derivable from a statute's text. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988); *see also* 2A Norman J. Singer, *Sutherland Statutory Construction* §§ 46.04, 46.07 (5th ed. 1992) (concluding that courts, when construing statutes, must adhere primarily to language and structure).

Fifth: We reject appellant's plea that denying an implied right of action will render nugatory the statutory provisions dealing with 60-mile tracks. Appellant's reliance upon a finding of especial benefit, *see supra* pp. 6-8, to prove this point is misplaced. That Congress purposely sought to confer a benefit on entities like Suffolk

does not imply that such was the only or even the overriding – motive for enacting the statute. *See, e.g., Cort*, 422 U.S. at 81-82 & n.13; *Cohen*, 647 F.2d at 212. Nor does Congress's intent to benefit 60-mile tracks inevitably imply that Congress deemed a private right of action to be a necessary or advisable means of accomplishing its goal. *See Coutu*, 450 U.S. at 771 (explaining that "[t]he fact that an enactment is designed to benefit a particular class does not end the inquiry; instead it must also be asked whether the language of the statute indicates that Congress intended that it be enforced through private litigation"); *accord Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 540-41 (1984); *Transamerica*, 444 U.S. at 24.

By making manifest that OTB offices operating without the approval of 60-mile tracks are flouting federal law, Congress supplied other parties with a potential defense should they cancel contracts with the offending facility or withhold consent to interstate off-track wagering at such a facility. *Cf., e.g., Alabama Sportservice, Inc. v. National Horsemen's Benevolent & Protective Ass'n. Inc.*, 767 F. Supp. 1573, 1579-80 (M.D. Fla. 1991) (suggesting that withholding of consent on reasonable grounds would not be an actionable restraint of trade). Moreover, creating the framework for assertion of such a defense benefits the 60-mile tracks by furnishing an incentive for display tracks to comply with the requirement.[6] *See generally*

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[6] Lincoln itself has been hoist on this petard. Several organizations withdrew consent because of Lincoln's failure to obtain Suffolk's approval, thereby depriving Lincoln of the right to accept wagers on races originating at the non-consenting tracks.

Daily Income Fund, 464 U.S. at 535, 541 & n.11 (explaining that the statutory objective to benefit a class may be served by giving other parties the right to sue). Similarly, display tracks and 60-mile tracks are frequently located in the same state and, therefore, subject to the same regulatory authority. Where that occurs, the IHA has the effect of permitting the racing commission either to insist on pre-approval or to work out some other satisfactory solution. Even when a 60-mile track does not have this home field advantage, the off-track racing commission may well be persuaded to take regulatory action against a display track which, like Lincoln, scorns a federal mandate. *Cf., e.g., CBS Inc. v. FCC*, 453 U.S. 367, 373-75 (1981); *FCC v. Pacifica Foundation*, 438 U.S. 726, 730-31 (1978).

In sum, our holding that no private right of action exists does not sanction blatant disregard of federal law or render the approval requirement without worth to the 60-mile tracks. It merely ensures that negotiations for a green light from market-area tracks will occur in the context Congress envisioned, with neither party completely beholden to the other. After all, were we to infer a right of action along the lines that Suffolk delineates, we would hand 60-mile tracks an important veto power over the operation of nearby OTB offices and, in the bargain, tilt the delicate balance Congress so painstakingly constructed.

We will not belabor the point. In the long run, Congress may well have thought that the indirect benefits flowing from a right of approval that had little bite were preferable to the potential vices involved in granting 60-mile tracks the right to gnaw at will. *See generally* Jerry L.

Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 Wm. & Mary L. Rev. 827, 842 (1991) (suggesting that implied private rights of action can eclipse the important role of agencies in weighing conflicting concerns); Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 45-51 (1984) (warning that courts, in venturing to alter the particular personality which Congress has chosen to embody in statutes, may shift the balance of entitlements and sire overdeterrence).

III. THE HOME STRETCH

We turn next, albeit briefly, to the question of whether appellant, on these facts, framed a cognizable claim under the RICO statute. Suffolk argues that Lincoln's unapproved acceptance of wagers constitutes a pattern of indictable activity under federal gambling laws and, therefore, violates the RICO statute. The court below did not agree. *See Sterling*, 802 F. Supp. at 669-70. We think the lower court reached the right result: Lincoln's acceptance of wagers on distant races without Suffolk's consent does not constitute a crime which can carry the weight of a RICO complaint.[7]

RICO targets the use, in connection with any enterprise affecting interstate commerce, of income derived "from a pattern of racketeering activity." 18 U.S.C. § 1962(a). The term "racketeering activity" is defined in 18 U.S.C. § 1961(1). Included in the definition is any act

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[7] Here, again, the issue is purely legal and appellate review is plenary.

indictable under 18 U.S.C. § 1084, a statute which criminalizes, *inter alia*, utilization of a wire facility for the "transmission in interstate . . . commerce of . . . information assisting in the placing of bets . . . on any sporting event." 18 U.S.C. § 1084(a). Conceding, withal, that wagering of the sort transacted at Lincoln's facility is permissible under the relevant laws of all interested states, appellant pins its RICO-related hopes on section 1084(a). But, section 1084(a) carves out a specific exception for circumstances in which wagering on a sporting event is legal in both the sending state and the receiving state. *See* 18 U.S.C. § 1084(b). That exception applies here.

Leaving the IHA to one side, appellant has no case. The legislative history of section 1084 shows beyond peradventure that Congress enacted section 1084(b) for the express purpose of allowing off-track betting in venues where states chose to legalize such activity (thereby reserving to individual states some measure of control over what forms of gambling could occur within their borders). *See* H.R. Rep. No. 967, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2632-33. Thus, given that the operation of Lincoln's OTB office does not offend relevant state law, we have no non-IHA-related reason to declare that the actions complained of in this suit constitute indictable conduct under section 1084.

Appellant tells us that the IHA makes a dispositive difference. But, we do not understand how this can be true. All available evidence indicates that Congress intended the IHA to have purely civil consequences. For instance, the IHA's enforcement and remedies sections specifically exclude the possibility of governmental involvement and/or the specter of criminal penalties. *See*

15 U.S.C. §§ 3005, 3006. The section dealing with jurisdiction and venue refers only to "civil action[s]." 15 U.S.C. § 3007. The legislative history teaches that Congress intended there to "be no Government enforcement" of the IHA; and further intended that "[a]ny person accepting an interstate wager other than in conformity with the act will *instead* be civilly liable in a private action for damages to the host State, the host racing association, and the applicable horsemen's group." S. Rep. No. 1117, 1978 U.S.C.C.A.N. at 4146 (emphasis supplied); *see also* H.R. Rep. No. 1733, 95th Cong., 2d Sess. 3 (1978) (same). In the face of this imposing array, Suffolk's argument that the IHA serves as a fulcrum to criminalize Lincoln's activities must fail.

To recapitulate, we think it clear that Congress, in adopting section 1084, did not intend to criminalize acts that neither the affected states nor Congress itself deemed criminal in nature. Lincoln's acts fall into this chiaroscuro category – perhaps not right, but certainly not felonious. It follows that these acts, not indictable under section 1084, cannot constitute a pattern of racketeering activity within RICO's definitional parameters. Hence, the court below properly granted summary judgment on the RICO count.[8]

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[8] The district court held, in the alternative, that RICO does not confer a right to sue for equitable relief on private plaintiffs and that, therefore, even if Suffolk had raised a colorable RICO claim, no injunction could issue. *See Sterling*, 802 F. Supp. at 670-71; *see also Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990) (expressing doubts about the availability of such relief). Because we affirm, without caveat, the district court's primary holding concerning the RICO claim, we do not address this alternate ground.

IV. AT THE WIRE

We need go no further. Simply stated, Congress's discernible intent precludes us from inferring a private right of action in appellant's favor. Because this is so, and because appellant's complaint likewise fails to limn a cognizable racketeering claim, the judgment below, to invoke the name of a very famous racehorse, must be

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

STERLING SUFFOLK RACECOURSE LIMITED PARTNERSHIP	)	
v.	)	C.A. No. 92-0154L
BURRILLVILLE RACING ASSOCIATION, INC.	)	

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, United States District Judge.

This matter is before the Court on plaintiff's motion for preliminary injunction to restrain defendant from accepting interstate wagers on horseracing absent plaintiff's approval and on defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff alleges that defendant has accepted and plans to continue accepting wagers on simulcast horseracing at defendant's Lincoln, Rhode Island facility in violation of: (1) the federal Interstate Horseracing Act of 1978 ("IHA"), 15 U.S.C. §§ 3001-3007 (1988); (2) Title IX of the federal Organized Crime Control Act of 1970, as amended, 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1989), commonly known as the "Racketeer Influenced and Corrupt Organizations Act" ("RICO"); and (3) the Massachusetts Consumer Protection Act, Mass. Gen. Laws Ann. ch. 93A (West 1984 & Supp. 1992) ("Chapter 93A"). Defendant contends that there are no genuine issues of material fact in dispute and that defendant is entitled to have all three claims against it dismissed as a matter of law.

BACKGROUND

Plaintiff, Sterling Suffolk Race Course Limited Partnership ("Sterling"), has had a license to operate live horseracing at Suffolk Downs, a track in East Boston and Revere, Massachusetts, since November 15, 1991. Sterling conducted live horseraces five afternoons a week, excluding Tuesdays and Thursdays, between January and May 1992, and plans to commence racing again on a similar schedule in October, 1992. Sterling draws its patrons primarily from Massachusetts, New Hampshire, and Rhode Island.

Defendant, Burrillville Racing Association, Inc. ("Lincoln"), is a Rhode Island corporation. Lincoln owns and operates a greyhound track, Lincoln Greyhound Park, located in Lincoln, Rhode Island, approximately fifty miles from Suffolk Downs. Since the summer of 1991, Lincoln has operated an offtrack horseracing facility at its Lincoln Greyhound Park, accepting wagers on simulcast horseraces. The simulcast programming consists of television reception at Lincoln of thoroughbred races conducted live at race courses throughout the United States. Lincoln uses telephone and other wire communications to assist in the placing of wagers in a "common-pool" with the out-of-state tracks. Lincoln has shown and accepted bets on horseraces from various tracks including Aqueduct Race Course, Saratoga Race Track, and Belmont Race Track in New York; Meadowlands Park in New Jersey; Santa Anita Race Course in California; and Gulfstream Park in Florida. Accepting wagers on simulcast programming of races from outside of Rhode Island is legal under

the laws of Rhode Island,[1] and the State of Rhode Island Department of Business Regulation has approved of the acceptance of wagers on simulcast programming at Lincoln. Similarly, the transmission of live races to off-track offices is permitted under the laws of each of the states from which Lincoln receives such transmissions, and it is lawful in each such state to wager upon the live races. Additionally, Lincoln has obtained the consents of the respective state racing commissions, live tracks, and appropriate horsemen's groups, to the extent required under the IHA, 15 U.S.C. § 3004(a). However, despite negotiations between the two entities, Lincoln has never obtained approval from Sterling of Lincoln's acceptance of interstate offtrack wagers on simulcast horseraces.

Sterling argues that Lincoln's acceptance of interstate wagers on simulcast horseraces is unlawful. Sterling further contends that such activity has harmed and will continue to harm Sterling's business by wrongfully drawing patrons to Lincoln who would otherwise bet on live horseracing at Suffolk Downs. Lincoln responds that all such claims should be dismissed.

After hearing arguments, the Court took the matter under advisement, and is now poised to decide the case. For the reasons that follow, plaintiff's motion for preliminary injunction is denied and defendant's motion for summary judgment is granted.

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[1] R.I. Gen. Laws § 41-11-2 (1991).

DISCUSSION

I. PRELIMINARY INJUNCTION

Addressing plaintiff's motion first, it is well established that for a preliminary injunction to issue the court must find four conditions: (1) the plaintiff has demonstrated a likelihood of success on the merits; (2) the plaintiff will suffer irreparable harm in the absence of injunctive relief; (3) the injury the plaintiff would suffer from a denial of injunctive relief is greater than the injury the defendant would suffer if injunctive relief were granted; and (4) the public interest will not be adversely affected by the granting of injunctive relief. *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir.1991); *Kleczek v. Rhode Island Interscholastic League*, 768 F.Supp. 951, 953 (D.R.I.1991). The moving party must demonstrate that these factors militate in its favor. In this instance, Sterling has failed to so persuade the Court.

Of the four factors, demonstrating a probability of success on the merits is the most "critical." *Narragansett Indian Tribe*, 934 F.2d at 6; *Kleczek*, 768 F.Supp. at 953. Although "a party need not *prove* its claims at the preliminary injunction stage," Sterling has not even shown that it is "*likely* to be able to prove its claims later." *Kleczek*, 768 F.Supp. at 953. In fact, the Court is convinced that, even viewing the facts in the light most favorable to Sterling, as is required for granting summary judgment in favor of Lincoln, *Continental Casualty Co. v. Canadian Universal Ins. Co.*, 924 F.2d 370, 373 (1st Cir.1991), Sterling's claims must be denied as a matter of law.

In determining Sterling's likelihood of success on the merits, the Court must analyze each of Sterling's three

independent claims. Although a likelihood of success on any one of these three claims could have satisfied the first prong of the preliminary injunction analysis, the Court concludes that all three lack merit.

A. The Interstate Horseracing Act

Sterling first claims that it will likely show that Lincoln has violated the IHA. However, as explained below, the Court finds that Sterling has no standing to bring suit under the IHA.

The IHA regulates wagering at off-track betting facilities, requiring the off-track offices to elicit consent or approval from various entities before accepting wagers on horseraces being run in other states. The law prohibits accepting such interstate off-track wagers except with consent from four parties: (1) the host racing association, which conducts the horseraces subject to the interstate wagers; (2) the horsemen's group, which represents the majority of owners and trainers with horses in races subject to the interstate wagers; (3) the host racing commission, which has jurisdiction to regulate the conduct of racing within the state in which the live horseraces occur; and (4) the off-track racing commission, which has jurisdiction to regulate off-track betting in the state in which the off-track betting occurs. 15 U.S.C. § 3004(a). It also states:

> In addition to the requirement of subsection (a) of this section, any off-track betting office shall

> obtain the approval of- (A) all currently operating tracks[2] within 60 miles of such off-track betting office; and (B) if there are no currently operating tracks within 60 miles then the closest currently operating track in an adjoining state. 15 U.S.C. § 3004(b)(1).

Sterling argues that, as it is a "currently operating track[] within 60 miles of the off-track betting office" at Lincoln ("60-mile track"), Lincoln violates the IHA by accepting interstate wagers without obtaining Sterling's approval.

Nonetheless, as Sterling admits, the IHA fails to provide 60-mile tracks a cause of action. Sixty-mile tracks are conspicuously absent from the list of entities explicitly provided a right to sue under the law. The enforcement provision of the law states: "The host State, the host racing association, or the horsemen's group may commence a civil action against any person alleged to be in violation of this chapter, for injunctive relief to restrain violations and for damages in accordance with section 3005 of this title." 15 U.S.C. § 3006. Sterling, therefore, argues that the Court should find an implied private right of action affording Sterling the opportunity to commence a civil action under the IHA. Courts imply private rights of action in federal statutes where they find Congressional intent to create such a private remedy. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979). However, "[a] formidable

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[2] " '[C]urrently operating tracks' means racing associations conducting parimutuel horseracing at the same time of day . . . as the racing association conducting the horseracing which is the subject of the interstate off-track wager." 15 U.S.C. § 3002(14).

obstacle confronts litigants who attempt to assert implied rights of action," *Royal Business Group v. Realist, Inc.*, 933 F.2d 1056, 1060 (1st Cir.1991), for " '[the Supreme] Court has long since abandoned its hospitable attitude towards implied rights of action.' " *Arroyo-Torres v. Ponce Federal Bank* 918 F.2d 276, 278 (1st Cir.1990) (quoting *Thompson v. Thompson*, 484 U.S. 174, 190, 108 S.Ct. 513, 521-22, 98 L.Ed.2d 512 (1988) (Scalia, J., concurring in judgment)).

In determining the existence of an implied private right of action, courts must engage in statutory construction. *See Touche Ross & Co.*, 442 U.S. at 568, 99 S.Ct. at 2485. "The ultimate question . . . is whether Congress intended to create a private remedy" in favor of this plaintiff. *Northwest Airlines v. Transport Workers Union of America*, 451 U.S. 77, 91, 101 S.Ct. 1571, 1580 67 L.Ed.2d 750 (1980). In the seminal *Cort v. Ash* decision, the Supreme Court set forth four factors to guide this analysis: (1) whether the plaintiff is one of the class for whose "especial benefit" the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, to create or deny such a remedy; (3) whether the remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law in an area basically the concern of the states so that it would be inappropriate to infer a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975); *see also, e.g., Nashoba Communications v. Danvers*, 893 F.2d 435, 439 (1st Cir.1990); *Latinos Unidos De Chelsea En Accion v. Secretary of Housing & Urban Dev.*, 799 F.2d 774, 792 (1st Cir.1986).

In 1986, the New Hampshire District Court, applying the foregoing analysis, found that the IHA contained no implied private remedy for 60-mile tracks. *New Suffolk Downs Coro. v. Rockingham Venture,* 656 F.Supp. 1190 (D.N.H.1987). After analyzing the *Cort* factors, this Court arrives at the identical conclusion.

1. Especial Benefit

Turning first to the "especial benefit" question, this Court agrees with the New Hampshire District Court (Judge Divine) that 60-mile tracks were "not one of the class for whose especial benefit the Act was passed." *New Suffolk Downs,* 656 F.Supp. at 1194. Admittedly, the national legislature intended the IHA to help 60-mile tracks compete with nearby off-track betting facilities. However, the "especial benefit prong" requires that "plaintiff and his class be the intended, primary beneficiaries." *Cohen v. Massachusetts Bay Transp. Auth.,* 647 F.2d 209, 212 (1st Cir.1981). Clearly, currently operating tracks do not occupy this status. Rather, as discussed below, the language, structure, and legislative history of the statute suggest that the IHA was designed primarily to protect the proprietary interests of those producing the live horseraces – the horsemen who own the horses running in the races, the host racing association which conducts the horseraces subject to the interstate wagers, and the host state which regulates and earns revenue from the live races. As the New Hampshire Court noted, "[T]he statute was created for the 'especial benefit' of those groups to insure that states which desire to run off-track betting

operations do not pirate the races of the host state without providing adequate compensation therefor." *New Suffolk Downs*, 656 F.Supp. at 1193.

Further, even if the Court agreed that Congress designed section 3004(b) primarily to provide special protection for 60-mile tracks, such a finding, "while indirectly evidencing legislative intent, is not dispositive of the issue." *Pacheco v. Raytheon Co.*, 777 F.Supp. 1089, 1091 (D.R.I.1991) (citing *Transamerica Mortgage Advisors (TAMA) v. Lewis*, 444 U.S. 11, 24, 100 S.Ct. 242, 249, 62 L.Ed.2d 146 (1979)). Accordingly, even if Sterling has an interest under this isolated section of the statute, the other three *Cort* factors indicate that Congress did not intend to provide 60-mile tracks with a private remedy. Rather, Congress, it is likely, intended section 3004(b) to give 60-mile tracks some leverage in informal negotiations to convince those with proprietary interests to withhold consent.

2. Congressional Intent

The Court next turns to the key inquiry regarding congressional intent to create a private remedy. Interpretation of legislative intent begins with the words of the statute. *Touche Ross & Co.*, 442 U.S. at 568, 99 S.Ct. at 2485. Here, the Court is greatly influenced by the explicit language of the IHA's enforcement and relief sections, provisions on which the Court should place particular emphasis. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13, 101 S.Ct. 2615, 2623, 69 L.Ed.2d 435 (1981). The Act clearly delineates the three

parties entitled to bring an action for damages or injunction, 15 U.S.C. § 3006, and anyone violating the IHA is liable for damages only to the identical three parties, 15 U.S.C. § 3005. Where, as here, "a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." *Karahalios v. National Fed'n of Fed. Emoloyees, Local 1263,* 489 U.S. 527, 533, 109 S.Ct. 1282, 1286 (1989). Further, in view of these provisions expressly granting remedies to other private parties, it is unlikely that " 'Congress absentmindedly forgot to mention an intended private action' " in favor of 60-mile tracks. *TAMA,* 444 U.S. at 20, 100 S.Ct. at 247 (quoting *Cannon v. University of Chicago,* 441 U.S. 677, 742, 99 S.Ct. 1946, 1981, 60 L.Ed.2d 560 (1979) (Powell, J., dissenting)).

Next, looking at the damages section, 15 U.S.C. § 3005(1)-(2), the formula set forth for calculating damages is based solely on the betting systems in use at either the host racing association or the off-track betting office. The section ignores the type of losses a 60-mile track could incur. This Court agrees with the New Hampshire District Court that "if Congress intended that tracks within sixty miles of the off-track betting location were to recover damages, they would have adopted a formula to include damages sustained by such tracks." *New Suffolk Downs,* 656 F.Supp at 1194. Along similar lines, venue for any action commenced under the IHA is appropriate only in the district court of the host state or the off-track state, 15 U.S.C. § 3007(b), while concurrent jurisdiction of state courts is provided only in the host state or the off-track state, 15 U.S.C. § 3007(c). By failing to grant jurisdiction and venue based on the state of a 60-mile track, the IHA,

once again, manifests a disregard for the ability of 60-mile tracks to sue under the statute.

3. Legislative Scheme

The third *Cort* factor also weighs against implying a private remedy for Sterling. Again agreeing with the Court in *New Suffolk Downs,* this Court finds that "it would be inconsistent with the underlying purposes of the legislative scheme to imply such a remedy in behalf of [a 60-mile track]." *New Suffolk Downs,* 656 F.Supp. at 1194. The legislative history reveals that the "most important feature of this legislation is that it establishes the proprietary relationship of the horseracing industry: that is, the horsemen and the racetracks, over its own races." 124 Cong. Rec. S31553 (daily ed. Sept. 26, 1978) (statement of Sen. Magnuson, one of the primary proponents of the IHA). Concerned about off-track betting offices pirating live horseraces, Congress designed the IHA to "protect[] the ordinary contractual process," *id.* (statement of Sen. Huddleston), and ensure that the track operators and the horsemen receive proper compensation for their product. Additionally, as discussed below, the IHA acknowledges the importance of state control over wagering within their borders. Although Congress intended that 60-mile tracks play some role in the off-track betting process, granting them the right to sue would frustrate the primary purposes of the Act.

If granted a private remedy, 60-mile tracks could unilaterally destroy an off-track betting facility by withholding approval and suing for an injunction. As nothing in the statute requires that 60-mile tracks grant approval,

if they had a private remedy, they might be able to withhold approval unreasonably and still receive injunctive relief. Such a situation would allow a third party to undermine the contractual process between the parties with a proprietary interest and the potential buyers, preventing the sale of the product entirely. The 60-mile tracks could also exploit a "veto power" by using it as a weapon to squeeze high fees in return for grants of approval. Importantly, the unilateral veto, which requires no state concurrence, could also interfere with state control over horseracing. Through the self-serving acts of refusing to grant approval and seeking an injunction, a 60-mile track could effectively block a state decision to allow, and earn revenue from, the interstate sale of races occurring live in their state or the conducting of off-track betting within state borders.

The absence of an intent to grant a private remedy to 60-mile tracks does not suggest that Congress included section 3004(b) frivolously, however. Rather, Sterling and other 60-mile tracks can employ their approval rights productively in a manner consistent with the legislative scheme. In negotiations with host racetracks or horsemen's associations, the approval rights afford 60-mile tracks leverage to persuade the proprietary parties to withhold consent absent the track's approval. In fact, Sterling may well have utilized this approach successfully in this instance. Lincoln claims that Sterling secured the cooperation of the Los Angeles Turf Club, which suspended its agreement to provide programming from Santa Anita, and the Florida Horsemen's Benevolent and Protective Association, Inc., which terminated programming from Calder Race Course. Sterling's efforts

may also have impeded Lincoln's ability to obtain simulcast programming from other tracks, including Arlington Race Track, Sportsman's Park, Oaklawn, and Pimlico. Similarly, the *New Suffolk Downs* Court noted that "[w]hen Suffolk withheld its consent to Rockingham to operate off-track betting, the New Hampshire Parimutuel Commission denied consent to Rockingham to do so." *New Suffolk Downs*, 656 F.2d at 1193. Although a New Hampshire state court later overruled the Commission's decision, finding that 60-mile tracks' approval was unnecessary, this incident is demonstrative of the cooperation the IHA attempts to engender among racing commissions in various states. *See id.* at 1193-94 & n.10.

4. Traditional State Jurisdiction

Finally, the Court is convinced that "inasmuch as the Act is a limited area of federal exercise of jurisdiction over an area primarily reserved to the states, it would be inappropriate to infer a cause of action in behalf of [60-mile tracks] based on this statute." *Id.* at 1194. States have traditionally maintained strict control over gambling within their borders. Congress explicitly recognizes the vested interests of the states in horseracing in the language and history of the IHA. For example, the very first line of the statute explains, "States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1). Similarly, the Senate Report expresses the view that "[gambling] matters are generally of State concern and that the States' prerogatives in the regulation of gambling are in no was [sic] preempted by this or

other Federal law." S. Rep. No. 1117, 95th Cong., 2d Sess. 3 (1978), *reprinted in* 1978 *U.S.C.C.A.N.* 4144, 4146. Acknowledging that the federal government was intruding into an area generally left to the states, Congress intended to do so with the least interruption possible. Granting an implied private remedy would unnecessarily and inappropriately transfer partial control over betting on horseracing from the states to private third parties.

In sum, the Court finds insufficient evidence from which to infer Congressional intent to grant a private remedy for currently operating tracks. The Court thus refuses to ignore the plain language of the statute by creating a remedy which Congress did not intend to grant. Consequently, Sterling has no standing to bring this action under the IHA.

B. Racketeer Influenced and Corrupt Organizations Act

Arguing that Lincoln's unapproved acceptance of wagers on certain simulcast horseraces constitutes a pattern of indictable activity under federal gambling laws, Sterling asserts that it will likely succeed on the merits of its independent claim that Lincoln has violated RICO. RICO prohibits persons from using income gained through a pattern of racketeering activities in the operation of any enterprise that is engaged in interstate commerce.[3] In addition to imposing criminal penalties, RICO

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[3] The relevant RICO section states, in part:
It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pat-

affords private parties who have been injured by the prohibited conduct a right to commence civil suits in federal court. 18 U.S.C. § 1964(c). The Court concludes that Sterling's claim under this section lacks merit and constitutes inappropriate bootstrapping. Sterling attempts to use a law Congress designed to deter criminal organized crime as a vehicle to attack activity that Congress clearly intended to be subject to strictly civil repercussions. More specifically, Sterling has not shown that Lincoln's behavior amounts to "racketeering activity" and has failed to request relief that this Court can grant it under the statute.

Sterling's greatest obstacle involves an inability to prove that Lincoln received income from a "pattern of racketeering activity." Among the numerous activities defined by the statute as "racketeering activity" is "any act which is indictable under . . . title 18, United States Code: . . . section 1084 (relating to the transmission of gambling information)." 18 U.S.C. § 1961(a). Section 1084 states, in part:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest

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tern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, . . . in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. 19 U.S.C. § 1962(a).

> . . . shall be fined not more than $10,000 or imprisoned not more than two years, or both. 18 U.S.C. § 1084(a).

However, the law provides an exception for, *inter alia*:

> the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State . . . where betting on that sporting event or contest is legal into a State . . . in which such betting is legal. 18 U.S.C. § 1084(b).

Sterling contends that (1) section 1084 applies to Lincoln's unapproved acceptance of wagers on simulcast horseraces, (2) the exception in section 1084(b) does not apply in this situation, (3) Lincoln's behavior is indictable under section 1084, and (4) therefore Lincoln's conduct constitutes "racketeering activity" under RICO. First, Sterling argues that Lincoln engages in the business of betting through its acceptance of wagers on simulcast horseraces. Sterling further contends that Lincoln knowingly uses a wire communication for the interstate transmission of bets or information assisting in the placing of bets by sending and receiving "common-pool" betting information via wire transmissions. Second, Sterling argues that, despite the approval of the relevant states' laws, the IHA renders the acceptance of interstate wagers on simulcast horseraces without the approval of 60-mile tracks illegal in all states under federal law. Therefore, the argument goes, the exception in section 1084(b) fails to apply.

Even accepting as correct the contention that section 1084 applies initially, the Court is not satisfied that Lincoln's activities are indictable under section 1084 or constitute "racketeering activity" under RICO. Importantly, Sterling's argument misunderstands the purposes and appropriate applications of the IHA, section 1084, and RICO. Sterling would have the Court determine that any violation of the IHA exposes the wrongdoer to criminal fines and imprisonment under section 1084 as well as civil treble damages or criminal penalties under RICO. Interpreting the section 1084(b) exception as excluding off-track betting solely as a result of a violation of the IHA would convert the civil violation into a criminal one. The Court believes that such an interpretation ignores Congress's intentions in enacting section 1084 and the IHA, and, thus, refuses to reach this inconsistent result.

In adopting section 1084, Congress did not intend to criminalize acts that neither states nor Congress desired to be treated as criminal. The legislative history of the Act makes it clear that Congress respected the rights of individual states to sanction off-track betting within their borders, so long as the state where the event occurred live likewise permitted wagering on the event. In fact, the legislature drafted the exception in 1084(b) specifically to accommodate the desire of some states to legalize off-track betting.[4]

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[4] The House Report, explaining section 1084(b) as of 1961, noted:

> Phrased differently, the transmission of gambling information on a horserace from a State where betting on that horserace is legal to a State where betting on the same horserace is legal is not within the prohibitions of the bill. Since Nevada is the only State which

Turning to the IHA, as discussed above, Congress clearly intended this Act to have purely civil consequences. Congress carefully designed the enforcement and remedies sections to exclude the possibility of government involvement and criminal penalties. Thus, the congressional reports emphasize, "While this bill provides for the regulation by the Federal Government of interstate wagering on horseracing, there will be no Government enforcement of the law. Any person accepting an interstate wager other than in conformity with the act will instead be civilly liable in a private action. . . . " S. Rep. No. 1117 at 4146; H.R. Rep. No. 1733, 95th Cong., 2nd Sess. 3 (1978).

The Court refuses to ignore the clear congressional intent to respect state gambling laws and not criminalize IHA violations. Thus, the Court concludes that Sterling's RICO claim has no merit in this case.

Additionally, even if Sterling had sufficiently raised a RICO claim, Sterling has no right to injunctive relief under the RICO statute. Sterling's standing to bring this suit would arise under RICO section 1964(c), which states:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost

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has legalized offtrack betting, this exemption will only be applicable to it. H.R. No. 967, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2632.

> of the suit, including a reasonable attorney's fee. 18 U.S.C. § 1964(c).

Importantly, this section, unlike section 1964(b) under which the United States may bring a RICO suit,[5] contains no express provision for an injunctive remedy. Courts disagree about whether section 1964(c), combined with section 1964(a), which grants district courts of the United States jurisdiction to prevent RICO violations by ordering, among other measures, equitable relief, allows private civil RICO plaintiffs to obtain injunctive relief. A number of courts have determined that such a remedy exists for private parties. *See, e.g., Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F.Supp. 1528, 1540-1541 (W.D. Pa.1984); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F.Supp. 908, 909-911 (E.D.N.Y.1983), *aff'd on other grounds*, 730 F.2d 905 (2d Cir.1984). However, a greater number have arrived at the contrary conclusion. *See, e.g., In re Fredeman Litig.*, 843 F.2d 821, 828-830 (5th Cir.1988); *Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir.1986), *cert. denied* 479 U.S. 1103, 107 S.Ct. 1336, 94 L.Ed.2d 187 (1987). The First Circuit, while not yet addressing this issue directly, has expressed doubts as to the availability of injunctive relief in private civil RICO actions. *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir.1990).

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[5] 18 U.S.C. § 1964(b) states:

> The Attorney General may institute proceedings under this section. . . . Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions . . . as it shall deem proper.

In 1986, the Ninth Circuit set forth a comprehensive discussion of the issue in *Wollersheim*, 796 F.2d 1076. Summarizing, the *Wollersheim* Court found: (1) The express inclusion of an injunctive remedy for the United States in § 1964(b) contrasted with only a damages remedy for private parties in § 1964(c) implies the exclusion of a private injunctive remedy, *id.* at 1083; (2) Congress's repeated rejection of language expressly authorizing injunctive relief for private plaintiffs in favor of language explicitly granting private action only for treble damages suggests legislative intent to exclude a private injunctive remedy, *id.* at 1084-86; and (3) the language of section 1964(c) was modeled on that contained in section 4 of the Clayton Act, 15 U.S.C. § 15(a), which courts have held precludes private injunctive relief. Congress was aware that the Clayton Act included an express authorization of private injunctive remedy in section sixteen of that Act. If it had desired to bestow this remedy on civil RICO plaintiffs, Congress would likely have "completed the analogy between civil RICO and the antitrust laws by including in civil RICO a private equitable relief remedy like section sixteen of the Clayton Act," *id.* at 1086-87.

This Court finds the *Wollersheim* analysis persuasive. In light of the sound reasoning in *Wollersheim* and the First Circuit's previously expressed doubts as to the authority of district courts to grant injunctive relief to private parties under RICO, this Court concludes that it would lack authority to grant Sterling the relief for which it prayed even if Sterling was otherwise entitled to it.

C. Chapter 93A

Sterling also argues that it will likely succeed in obtaining an injunction on the merits of its claim based on Chapter 93A, the Massachusetts Consumer Protection Act. Chapter 93A prohibits unfair and deceptive trade practices occurring primarily and substantially within the Commonwealth of Massachusetts. Mass. Gen. Laws Ann. ch. 93A, §§ 2, 11. Sterling contends that Lincoln's unapproved acceptance of interstate wagers on simulcast horseraces contravenes the IHA and congressional policy protecting 60-mile tracks and thus constitutes the type of unfair practice prohibited by Chapter 93A. In addition, Sterling attacks a variety of Lincoln's alleged actions in negotiating with Sterling and other racetracks as unfair and deceptive practices.

The Court's analysis of the Massachusetts Consumer Protection Law reveals that it is unlikely Sterling will be able to prove that Lincoln violated Chapter 93A. Sterling's primary claim implicates actions that did not occur "primarily and substantially within" Massachusetts while the other actions it attacks failed to give rise to any injury.

In its original complaint and brief, Sterling argues that Lincoln's unapproved acceptance of wagers on horseraces simulcast at the same time of day as live horseraces at Suffolk Downs violates the federal IHA and is thus unfair. Sterling further claims that Lincoln deceptively distributed a letter falsely stating that Sterling had approved Lincoln's simulcasting. However, as Sterling, which changes the factual basis of its complaint in its reply brief, seems to implicitly recognize, Chapter 93A

does not apply to these actions. The Massachusetts statute states, "No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth." *Id.* at § 11. Although the defendant bears the burden of proving that the actions and transactions did not occur primarily and substantially within Massachusetts, *id.*, Lincoln will likely meet this burden.

Numerous Massachusetts cases have analyzed whether actions complained of "occurred primarily and substantially within the commonwealth." *See, e.g., Bushkin Assocs. v. Raytheon Co.*, 393 Mass. 622, 637-39, 473 N.E.2d 662, 671-72 (1985); *Makino, U.S.A. v. Metlife Capital Credit*, 25 Mass.App.Ct. 302, 308-11, 518 N.E.2d 519, 522-24 (1988). The First Circuit, interpreting Massachusetts cases, explained that courts may assess the totality of the circumstances with a pragmatic, functional approach. *Clinton Hosp. Ass'n v. Corson Group*, 907 F.2d 1260, 1265-67 (1st Cir.1990). It set forth three important factors to consider: (1) where the defendant committed the deceptive or unfair practice; (2) where the plaintiff received and acted upon the deceptive or unfair statement; and (3) the situs of the plaintiff's loss due to the unfair or deceptive practice. *Id.*

Applying this analysis to the present case, the Court is convinced that neither Lincoln's allegedly unfair practice of accepting wagers on simulcast horseraces run contemporaneously with Suffolk Downs' races nor Lincoln's alleged act of disseminating a letter indicating Sterling's

approval occurred "primarily and substantially" in Massachusetts. First, and most importantly, as Lincoln only simulcasts and accepts wagers on horseraces at its Rhode Island facility, the alleged unfair and deceptive acts of simulcasting and accepting wagers occurred and will occur in Rhode Island, not Massachusetts. Additionally, assuming that Lincoln disseminated a letter to racetracks running live horseraces, this letter must have been written in and sent from Rhode Island and delivered to racetracks in various states, none of which were in Massachusetts.

The two other factors considered by the First Circuit fail to alter the result. The second consideration, where the plaintiff received and acted upon the unfair statement, is inapplicable to both the acceptance of interstate wagers and the alleged dissemination of letters. Neither involved representations intended to sway, or with the effect of swaying, Sterling into action or inaction. Finally, while Sterling's loss of patronage, if any, occurred in Massachusetts, this does not persuade the Court that Chapter 93A applies. Although the place of loss was once the primary factor assessed in this determination, the Massachusetts Appellate Court has downplayed the significance of the site of loss in recent years. That court explained, "[I]f the place of injury were the only test, practically no case involving a Massachusetts plaintiff would be exempt from c. 93A status, no matter how negligible the defendants, business activity in this State." *Makino*, 25 Mass.App.Ct. at 309-310, 518 N.E.2d at 523 (citing *Goldstein Oil Co. v. C. K. Smith Co.*, 20 Mass.App.Ct. 243, 249 n.7, 479 N.E. 2d 728, 731 n.7

(1985)). Thus, considering the totality of the circumstances, Lincoln has shown that the actions complained of did not occur "primarily and substantially" within Massachusetts.

Searching for actions that occurred in Massachusetts, Sterling, in its reply brief for the first time, claims that the unfair behavior involved Lincoln's: "purporting to negotiate under the terms of the IHA" with Sterling in Massachusetts; "violating the IHA despite those negotiations;" sending a letter to Sterling stating that Sterling lacked standing to assert any claim under the IHA; and failure to inform Sterling that it had expanded the number of out-of-state tracks on which it would accept wagers. The Court finds that these feeble allegations fail to inject life into the claim. The actions implicated, even in the light most favorable to Sterling, either did not occur in Massachusetts or could not have caused any loss Sterling alleges to have suffered as a result of Lincoln's conduct, as required by Chapter 93A. *Massachusetts Farm Bureau Fed'n. v. Blue Cross of Mass.*, 403 Mass. 722, 730, 532 N.E.2d 660, 665 (1989). Thus, Sterling has failed to demonstrate a likelihood of success on its Chapter 93A claim in the complaint.

In sum, the Court finds that Sterling has failed to establish a likelihood of success on any of its claims. As likelihood of success is "critical" in the preliminary injunction determination, *Narragansett Indian Tribe*, 934 F.2d at 6; *Kleczek*, 768 F.Supp. at 953, the Court finds it unnecessary to explicitly consider the remaining preliminary injunction factors. Thus, the foregoing reasoning suffices as a basis for denying plaintiff's motion for preliminary injunction.

II. SUMMARY JUDGMENT

Turning to Lincoln's motion, the standard for ruling on a summary judgment motion is set forth in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Further, the court must view the facts and all inferences therefrom in the light most favorable to the nonmoving party. *Continental Casualty & Sur. Co.*, 924 F.2d at 373.

Applying the standard here establishes that the two federal question claims are ripe for summary judgment. As detailed above, there are no genuine issues of material fact, even viewing the record in the light most favorable to Sterling. The issues in question are ones of law, not fact. Following the reasoning advanced for the preliminary injunction analysis, the Court has determined that Lincoln is entitled to a judgment as a matter of law on both of these claims. First, Sterling, as a 60mile track, has no standing under the IHA. Second, Lincoln's acceptance of interstate wagers, even accepting Sterling's version of the facts, does not amount to "racketeering activity" under RICO, and Sterling could secure no relief under the statute.

Dismissing the two federal claims leaves only the Massachusetts Consumer Protection Act claim. As plaintiff has not alleged the existence of diversity jurisdiction,

the Court must determine whether to exercise its pendent jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). "The Supreme Court has pointed out: '[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims.' " *Newman v. Burgin*, 930 F.2d 955, 964 (1st Cir.1991)(quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 619 n. 7, 98 L.Ed.2d 720 (1988)). Accordingly, in light of the interests of judicial economy, convenience, fairness, and comity in this instance, the Court declines to exercise jurisdiction over the Massachusetts claim.

CONCLUSION

Consistent with the foregoing reasoning, the Court denies Sterling's motion for preliminary injunction, grants Lincoln's motion for summary judgment on the two federal claims against it, and declines to exercise jurisdiction over the state law claim. The Clerk will enter judgment for the defendant forthwith.

It is so Ordered.

/s/ Ronald R. Lagueux
Ronald R. Lagueux
United States District Judge
October 5, 1992

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2260

STERLING SUFFORK RACECOURSE
LIMITED PARTNERSHIP,
Plaintiff, Appellant,

v.

BURRILLVILLE RACING ASSOCIATION INC.,
AND TOURISM & DEVELOPMENT CORP., INC.,
Defendants, Appellees.

JUDGMENT

Entered: March 25, 1993

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed and as follows: The judgment of the district court is affirmed.

By The Court

FRANCIS P. SCIGLIANO

Clerk.

[cc: Messrs Tucker and Mast]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2260

STERLING LIMITED RACECOURSE
LIMITED PARTNERSHIP,
Plaintiff, Appellant,

v.

BURRILLVILLE RACING ASSOCIATION INC.,
AND TOURISM & DEVELOPMENT CORP., INC.,
Defendants, Appellees.

BEFORE

BREYER, *Chief Judge*,
TORRUELLA, SELYA, CYR, BOUDIN and STAHL,
Circuit Judges.

ORDER OF COURT

Entered April 20, 1993

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that this appeal be heard or reheard en banc,

It is ordered that the petition for rehearing and the suggestion for a rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO

Clerk.

(cc: Messrs. Tucker, Ricciute, Crevier, McGinn, Mast)

Supreme Court, U.S.
FILED
NOV 19 1993
OFFICE OF THE CLERK

No. 93-466

In The

Supreme Court of the United States

October Term, 1993

STERLING SUFFOLK RACECOURSE LIMITED PARTNERSHIP,

Petitioner,

v.

BURRILLVILLE RACING ASSOCIATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a private right of action must be implied in favor of 60-mile tracks under the Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001 *et seq.*, where the statute provides a remedy only for three specified categories of plaintiffs; there is no evidence of congressional intent to provide such an additional remedy; and such a cause of action would be inconsistent with the underlying purposes of the legislative scheme.

RULE 29.1 LIST

Pursuant to Rule 29.1, Rules of the Supreme Court of the United States, respondent Burrillville Racing Association, Inc., states that its parent corporation is Wembley PLC, a corporation organized under the laws of England. Shares of Wembley PLC are traded publicly. Lincoln has no subsidiaries.

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STATEMENT OF THE CASE

Petitioner Sterling Suffolk Racecourse Limited Partnership ("Sterling") seeks to create by implication a right of action in its favor under the Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001-3007 (1988) ("IHA"), despite the fact that Congress neither provided such a claim nor intended that it be available to Sterling. Recognizing that the implication of such a claim is contrary to congressional intent and would subvert the underlying purposes of the IHA, the Courts below properly rejected Sterling's request.

The IHA governs interstate off-track wagering on live horseraces through a statutorily mandated contract process which prioritizes the rights and roles of various interested parties. Interstate off-track wagering occurs when a live horserace run at a track (the "host racing association" or "host track") in one state (the "host State") is televised simultaneously to a location in another state (the "off-track" site in the "off-track State") where patrons wager on the race pursuant to the laws of the off-track State. 15 U.S.C. § 3002. Under the IHA, such wagering may be conducted "only if consent is obtained from" four entities participating in such "simulcast": the "host racing association" (the track conducting the live race), the "horsemen's group" of the host track (the group representing the "majority of owners and trainers racing" at the host track), the "host racing commission" (the agency regulating racing in the host State), and the "off-track racing commission" (the agency regulating racing in the off-track State). 15 U.S.C. § 3004(a). After completion of this process, off-track sites "shall obtain the approval" of "currently operating tracks" within sixty miles of the

off-track site[1] ("60-mile tracks").[2] 15 U.S.C. § 3004(b). The 60-mile tracks do not participate and have no proprietary interest in the interstate wagering/simulcast transactions, nor any regulatory function concerning them.

Through the IHA, Congress created a method to compel resolution of conflicts between the interests of those producing the live races, which furnish the "show" for interstate wagering, and those seeking to exploit that product at a distant site through simulcasts. Thus, the IHA first provides for a contract and consent process – contract between horsemen and host track, contract between host track and simulcast site, consent by regulatory bodies of both the host and off-track States – which assures the protection of the proprietary interests of the host entities and of the rights of each state. It is only after the IHA so harmonizes the interests of all involved in the actual components of the simulcast that the IHA provides for "approval" by 60-mile tracks, the only entity not involved in the interstate wagering transactions.

The three remaining operative sections of the IHA reflect carefully crafted and detailed relief provisions, all of which grant judicial remedies only for, and liabilities solely to, the host entities – the three specific groups

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[1] If there is no "currently operating track" within 60 miles, then the off-track site "shall obtain approval" of the "closest currently operating track in an adjoining State." 15 U.S.C. § 3004(b)(1)(B).

[2] Sterling refuses to acknowledge Congress' explicitly separate use of the words "consent" (§ 3004(a)) and "approval" (§ 3004(b)). Throughout its Petition, Sterling places itself in the "consent" group. However, the word "consent" is never used in the IHA in conjunction with 60-mile tracks.

sharing proprietary interests in the live races that are simulcast (the host track, the host horsemen's group and the host State) (15 U.S.C. § 3006) – including specific procedures for calculation and allocation of damages among these host entities. 15 U.S.C. § 3005. These parties may assert a claim against "any person" acting in violation of the IHA. 15 U.S.C. §§ 3005, 3006(a). Moreover, the IHA limits venue and jurisdiction of any enforcement actions to courts in the host or off-track States. 15 U.S.C. § 3007(b)-(c).

The facts relevant to application of the IHA are virtually without dispute.[3] Respondent Burrillville Racing Association, Inc., owns Lincoln Greyhound Park, a greyhound racing facility in Lincoln, Rhode Island ("Lincoln"). Lincoln's operations are governed by Rhode Island law and regulated by the Division of Racing and Athletics of the Rhode Island Department of Business Regulation. *See* R.I. Gen. Laws ch. 1-3.2 and 41-4. Pursuant to such authorization, Lincoln has conducted live greyhound racing for wagering purposes and, from time to time since July of 1991, has offered wagering upon simulcast races from various thoroughbred tracks. All

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[3] Petitioner incorrectly states that "[b]oth sides agree that there was no evidence anywhere in the legislative history that Congress intended to deprive 'currently operating' tracks of a remedy." (Petition, p. 4.) Respondent agrees that the legislative history does not include a specific discussion of whether or not 60-mile tracks should have a remedy, nor a specific statement that they should not. The legislative history, however, is replete with evidence that Congress intended to grant remedies only to the three entities expressly given a cause of action under the IHA and that it was fully aware of the fact that only such entities would have a remedy under the statute.

such simulcast programming and related wagering has been conducted with all consents required under Section 3004(a) of the IHA.

Sterling reopened Suffolk Downs (after approximately two years of dormancy) on January 1, 1992. Shortly before that date, Lincoln rejected Sterling's offer to approve Lincoln's preexisting simulcast programs if Lincoln agreed to simulcast Sterling races for a fee which Lincoln considered excessive. Sterling then communicated the fact of its failure to approve Lincoln's simulcast activity to host tracks which were actual or potential sources of live races for Lincoln, to the horsemen's groups operating at such tracks and to the applicable racing commissions. Sterling sought cessation of simulcast transmissions to Lincoln by those who had previously agreed to provide live racing events and refusal by other live tracks to provide simulcasts to Lincoln.

These efforts succeeded. For example, the Los Angeles Turf Club suspended its agreement to provide races from Santa Anita Race Track and Calder Race Course in Florida terminated simulcast transmissions because its horsemen's group revoked consent for participation by Lincoln. Sterling also frustrated Lincoln's efforts to obtain programming from other tracks. Unable to persuade all host entities to withhold consent for simulcast of live races to Lincoln, however, Sterling brought this action.

The district court reasoned that application of the four-part test established by this Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975), precluded implication of a private right action for 60-mile tracks such as Sterling. The district

court found congressional intent to provide such a claim lacking and, in fact, that such an implied cause of action would be fundamentally inconsistent with the legislative scheme of the IHA.

The First Circuit affirmed the district court decision. The First Circuit engaged in a thorough statutory analysis which applied the decisions of this Court and examined the language, structure and purposes of the entire IHA. *See* 15a-25a.[4] Determining that "[t]he language of almost every section of the IHA, and the structure of the pivotal provisions, strongly suggest that Congress did not intend to provide disapproving 60-mile tracks with a private right of action," the First Circuit found no support for an inference of any congressional intent to create a right of action for 60-mile tracks. *See* 22a. Beyond these factors, the First Circuit concluded its analysis by reviewing the IHA's underlying purposes, recognizing that "were we to infer a right of action along the lines Suffolk delineates, we would hand 60-mile tracks an important veto power over the operation of nearby OTB offices and, in the bargain, tilt the delicate balance Congress so painstakingly constructed." 24a. In sum, "Congress's discernible intent" precluded the First Circuit "from inferring a private right of action in [Petitioner's] favor." Thus, applying the proper legal standards to the totality of the statutory scheme, the First Circuit correctly refused to rewrite the IHA.

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[4] Citations to "___a" refer to the Appendix to Sterling's Petition for Writ of Certiorari.

REASONS FOR DENYING CERTIORARI

Sterling has provided no reason or issue which merits review by this Court. The reported decisions on the issue presented here have uniformly rejected Petitioner's contentions.[5] As Petitioner concedes (Petition, p. 6), there is no circuit court conflict because the First Circuit is the only appellate court which has reviewed this issue. Petitioner's myopic contention that the First Circuit decision contravenes precedent of this Court by emphasis upon remedial omissions is belied both by this Court's decisions and by the First Circuit's thorough analysis thereunder. The decision below is correct and consistent with the decisions of this Court. Similarly, the total lack of any litigation concerning 60-mile tracks under the IHA, apart from the two actions commenced by one race track, Suffolk, deflates Sterling's characterizations of the importance of this matter.

1. The First Circuit correctly applied the appropriate analytical framework.

Sterling attempts to demonstrate misapplication by the First Circuit of well established principles of statutory construction and of tests for determining the existence of an implied right of action by mischaracterizing a selected

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[5] The three reported decisions are the two below and *New Suffolk Downs Corp. v. Rockingham Venture, Inc.*, 656 F. Supp. 1190 (D.N.H. 1987). The plaintiff in *New Suffolk Downs Corp.* was the previous owner and operator of the Suffolk Downs Race Course which is now owned by Petitioner and is the 60-mile track in this action.

portion of the First Circuit's analysis. Contrary to Petitioner's contentions, the First Circuit properly considered and applied all of the various principles relative to this inquiry as taught by *Cort v. Ash* and its progeny without any undue emphasis or inappropriate presumptions.

Petitioner does not, and cannot, dispute that the First Circuit properly focused its analysis upon a search for congressional intent (16a) nor the fact that such intent, as acknowledged by the Court below, must be inferred from review of "the language of the statute, the statutory structure or some other source." *Id.*, quoting *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 532-33 (1989); *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981); *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). This search should place "particular emphasis" on the statutory provisions for "enforcement and relief." *National Sea Clammers*, 453 U.S. at 13. There is no question that the First Circuit properly began by framing its analysis to employ the inquiries directed by *Cort, supra*, and the other pertinent decisions of this Court. 16a-17a.

The First Circuit proceeded to apply the mandates of this Court deliberately and expertly. After announcing affirmance of the district court decision for the reasons stated in its opinion, the First Circuit reviewed and amplified the analysis. Finding initially that 60-mile tracks were "especially benefitted" by the IHA, the First Circuit correctly recognized that such a determination does not end the inquiry and is not dispositive of congressional intent. 17a-19a. *See Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771 (1981) ("the fact that an enactment is designed to benefit a particular class does not end

the inquiry; instead, it must also be asked whether the language of the statute indicates that Congress intended that it be enforced through private litigation"); *Daily Income Fund v. Fox*, 464 U.S. 523, 540-41 (1984); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979). The First Circuit concluded that "especial benefit" status was outweighed by the "bold-faced evidence of congressional intent intricately interwoven into the IHA's language and structure." 19a.

The First Circuit found no basis in the language of the statute to support the implication of a private right of action. Assessing first the language of the enforcement, venue and jurisdictional provisions of the IHA, 15 U.S.C. §§ 3005-3007, the Court determined that both "what the IHA says and what it shies away from saying" fail to support an inference of congressional intent to provide a private right of action to 60-mile tracks. 20a-21a. Additional review of the language and structure of the "consent" and "approval" provisions of the IHA, 15 U.S.C. §§ 3004(a)-3004(b), confirmed an absence of the requisite congressional intent and the First Circuit concluded that "[t]he language of almost every section of the IHA, and the structure of the pivotal provisions, strongly suggest that Congress did not intend to provide disapproving 60-mile tracks with a private right of action against display tracks." 21a-22a.

The First Circuit then addressed the next inquiry of its statutory interpretation framework – whether the "remedy sought" is "consistent with the underlying purposes of the legislative scheme" (16a) – and concluded it was not. 22a-25a. Reviewing the objectives and purposes

of the IHA as a whole, the First Circuit recognized that to grant Petitioner the right which it sought would be to turn the IHA upside down, permitting a third-party stranger to the interstate wagering transaction to have a power not subject to regulatory review by which it could totally frustrate the IHA contractual process and the realization of the host entities' proprietary interests.[6] Thus, the First Circuit noted that "were we to infer a right of action along the lines that Suffolk delineates, we would hand 60-mile tracks an important veto power over the operation of nearby OTB offices and, in the bargain, tilt the delicate balance Congress so painstakingly constructed." 24a. In sum, the First Circuit found that the language and structure of the IHA did not evidence congressional intent necessary to imply a private cause of action for 60-mile tracks, and that such a remedy would be inconsistent with the purposes of the IHA. 19a-25a.

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[6] Under Petitioner's theory, the careful progression of horsemen/host track bargaining contract, host track/off-track contract, and state permission directed by the IHA would be wholly unprotected from the decisions, by whim or otherwise, of 60-mile tracks, the only decisions under the IHA which are neither part of a contract process nor subject to state regulatory review. Whenever it wished, a 60-mile track, whose only interest is to prevent competition, could announce disapproval of simulcast contracts and cause their termination, thus depriving the host entities of their negotiated compensation and the host and off-track States of their revenues and regulatory decision.

2. Petitioner's criticism is not compelling and inaccurately characterizes the First Circuit's analysis.

Distilled to its essence, Petitioner's criticism of the First Circuit's decision is simply an argument with the result, rather than a meaningful exposition of defects in the analysis. Petitioner's repeated assertion that the First Circuit limited its analysis to the "remedial provisions" of the IHA (*e.g.*, Petition, pp. 6, 10, 12) ignores the First Circuit's express consideration of the purposes of the IHA as a whole, "the statutory provisions dealing with 60-mile tracks" (22a-24a), the "language of almost every section of the IHA, and the structure of the pivotal provisions" (22a), including, specifically, Sections 3004(a), 3004(b) – the substantive provisions – and Sections 3005-3007 – the remedial provisions. Petitioner points to no reason why the careful consideration given by the First Circuit to the IHA remedial provisions is in any respect inconsistent with the decisions of this Court. *See National Sea Clammers*, 453 U.S. at 13 ("we look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief").

Moreover, Petitioner's contention that the First Circuit allowed "the omission of a party from the remedial provision to control" (Petition, p. 6) is incorrect. Correctly applying the principles articulated by this Court, the First Circuit, employing no undue "presumption" concerning omission of any cause of action for 60-mile tracks from the IHA, concluded that the language actually used in the IHA, as well as what was omitted ("what the IHA says and what it shies away from saying" (21a)), failed to

furnish a basis for an inference of the requisite congressional intent.

The fact that remedies are provided by the IHA only for the three proprietary entities having consent powers under Section 3004(a) does demonstrate an absence of congressional intent to also grant 60-mile tracks a claim based upon violations of the IHA. *See Transamerica*, 444 U.S. at 20 (" '[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode' "); *Russello v. United States*, 464 U.S. 16, 23 (1983) (" 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion' "). Such an express provision of remedies is inconsistent with any contention that Congress inadvertently omitted 60-mile tracks from the IHA enforcement provisions. *See Transamerica*, 444 U.S. at 20; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) ("obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly"); *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471 (1959) ("[w]e find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I [of the Interstate Commerce Act] were wholly omitted in the Motor Carrier Act").

Petitioner's attempts to avoid these decisions by an "additional remedy" distinction (Petition, pp. 8-9) are not compelling. In none of the cases referred to by Sterling did this Court rely upon the availability of other avenues of relief for the plaintiff involved as the basis for deciding

against an implied remedy. Rather, the existence of such other avenues of relief was relied upon as *evidence* that Congress did not intend additional remedies, consistent with the maxim of *expressio unius*. *See Transamerica*, 444 U.S. at 20; *National Sea Clammers*, 453 U.S. at 15 (enforcement provisions created "inference" of congressional intent); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). Significantly, this Court has applied the same principles to the circumstances which Sterling claims as its own, *i.e.*, where no other remedy whatsoever was available to the plaintiff. *See T.I.M.E., Inc., supra*, (no cause of action for shipper under the Motor Carrier Act); *Touche Ross*, 442 U.S. at 574 (no implied cause of action under § 17(a), and no express cause of action under § 18(a) of the Securities Exchange Act of 1934).

Furthermore, this Court's decisions permit implication of a cause of action only when such a remedy is consistent with the underlying purposes of the statute at issue. *See Cannon v. University of Chicago*, 441 U.S. 677, 703-708 (1979). Unlike the decision upon which Petitioner relies (*Cannon, supra*), where the implied remedy sought by the potential plaintiff was not only consistent with, but necessary to, the underlying purpose of the statute, the remedy sought by Sterling is not only contrary to, but would effectively preclude, the objectives of the IHA. 22a-25a.

Sterling's effort to convert that portion of the First Circuit's opinion discussing the language of the statute in the context of its remedial provisions (19a-21a) into the

entire opinion,[7] while ignoring the remainder of the First Circuit's analysis, is transparent and unavailing. The multiple components of the First Circuit's analysis are obvious on the face of its opinion. As detailed above, *supra* at Section 1, the First Circuit, guided by this Court's decisions, carefully considered the language of both the substantive and remedial provisions of the IHA, the structure of the IHA and the inconsistency of the remedy sought with the fundamental purposes of the IHA. In its parts and in its totality, this analysis was methodically and correctly performed.

At its core, Petitioner's argument is that a private cause of action should be implied in its favor regardless of congressional intent and despite the fact (which Petitioner ignores) that such a remedy would disrupt the objectives of the statute. Petitioner, in effect, would have this Court adopt a presumption of congressional intent to provide an implied cause of action in all cases where such a remedy is omitted from the express terms of the statute. Such an approach is utterly unsupported by, and inconsistent with, the principles articulated by the decisions of this Court. *See, e.g., Thompson*, 484 U.S. at 179; *Cort, supra*. As a district court observed concerning an argument similar to Petitioner's: "[t]he fallacy of Plaintiffs' argument lies in their attempt to use the negative to prove the positive. Because a private cause of action may not exist when a statute provides a remedy does not prove that a cause of action exists when Congress does not provide a

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[7] For example, Petitioner claims that "[i]nstead of considering the statute, the court of appeals considered its remedial provisions." (Petition, p. 10.)

remedy." *Michigan Hosp. Ass'n v. Department of Social Servs.*, 738 F. Supp. 1080, 1084 (W.D. Mich. 1990). Significantly, there is no evidence in the legislative history of the IHA that Congress intended to create a remedy for any party other than the host track, the host State and the horsemen's groups.[8]

3. There are no other reasons for review.

Petitioner's views concerning the alleged "national significance" of this issue for its current purposes are belied by the paucity of litigation concerning 60-mile

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[8] The enforcement and remedy provisions of the IHA remained virtually identical throughout the 53 drafts of the legislation. Congress described its action consistently throughout the development of the IHA:

> Any person accepting an interstate wager other than in conformity with the Act will, instead, be civilly liable in a private action to the host state, the host racing association and the applicable horsemen's group in accordance with the formula that is generally intended to give these parties the amounts they would have received had the wager been placed on-track.
>
> In addition to a suit for damages, the host state, host racing association, or applicable horsemen's group may commence a civil action for injunctive relief to restrain further violations of this Act.

Report of the Senate Judiciary Committee, S.Rep. No. 1117, 95th Cong., 2d Sess. 3, 10-11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4144, 4146, 4153-54; *Report of the House Committee on Interstate and Foreign Commerce*, H.R. Rep. No. 1733, 95th Cong., 2d Sess. 3-4, 10-11 (1978); *compare Report of the House Committee on Interstate and Foreign Commerce*, H.R. Rep. No. 1366, 94th Cong., 2d Sess. 5, 10-11 (1976).

track approval rights. In fact, during the 15-year history of the IHA, the issue has been raised by only one race track – Suffolk Downs – and in only two cases, the instant litigation and that reported in *New Suffolk Downs, supra.* The controversy which led to the enactment of the IHA after two years of congressional labor was no less significant in 1978 than it is now. Nevertheless, apart from Petitioner, the public record, to date, reflects a distinct lack of concern by racetracks. These circumstances may suggest that the statutory compromise forged by the IHA struck an appropriate balance between the competing interests of live racetracks and off-track betting sites, or reflect a general recognition by 60-mile tracks of their abilities and influence with host entities (*see, supra,* at p. 4). In any event, the issues addressed by the First Circuit clearly do not rise to a level of importance which would warrant a writ of certiorari from this Court.[9]

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[9] The other decisions under the IHA involve issues wholly unrelated to the issue of a remedy for 60-mile tracks under the statute: *Retail, Wholesale and Department Store Union, Local 301 v. NLRB,* 745 F.2d 358 (6th Cir. 1984) (National Labor Relations Board's decision to continue policy of refusing to exercise jurisdiction over the horse and dog racing industries justified by Congress' failure to overrule policy in IHA); *New York Racing Ass'n, Inc. v. NLRB,* 708 F.2d 46 (2d Cir.), *cert. denied,* 464 U.S. 914 (1983) (same); *Alabama Sports Service, Inc. v. National Horsemen's Benevolent & Protective Ass'n, Inc.,* 767 F. Supp. 1573 (M.D. Fla. 1991) (suit by off-track betting system alleging illegal restraint of trade through withholding of consent of horsemen's association to simulcasting); *Atlantic City Racing Ass'n v. Attorney General of New Jersey,* 461 A.2d 178 (N.J. Super. Ct.), *aff'd,* 486 A.2d 1261 (N.J. Super. Ct. App. Div.), *rev'd on other grounds,* 489 A.2d 165 (N.J. 1985) (IHA does not preempt state legislation on parimutuel system of wagering). In addition, the United States

The IHA reflects a congressional compromise forged through lengthy and intense negotiations by many industry interest groups. As enacted, the IHA is intended "to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers" and to promote the congressional policy "to further the horseracing and legal off-track betting industries in the United States." 15 U.S.C. § 3001(a)(3), 3001(b). Petitioner's objective is to have this Court do for 60-mile tracks what Congress refused to do, and to obtain through this Court a unilateral, unrestricted veto power over the decisions and interests of state racing commissions and the tracks and horsemen's groups responsible for conducting the live races utilized for off-track wagering purposes. Contrary to Petitioner's plea, it is this result which will destroy the "balance of interests" created by the statute. (Petition, p. 15.)

Petitioner seeks to gain through this Court an implied right of which the sole purpose and function is to eliminate competition. The First Circuit methodically followed and applied the well-established legal principles of this Court to conclude that no implied right of action exists in favor of 60-mile tracks under the IHA because

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District Court for the Eastern District of Kentucky, William O. Bertelsman, Chief Judge, recently issued an unreported opinion in *Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc., et al. v. Turfway Park Racing Ass'n, et al.*, Civil Action No. 92-199, 1993 WL 370579 (E.D. Ky. Sept. 20, 1993), holding that the IHA is unconstitutional.

there is no evidence of congressional intent supporting such an implication.

CONCLUSION

Based upon the foregoing, review by this Court is unnecessary. The Petition for Writ of Certiorari should therefore be denied.

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In The

Supreme Court of the United States

October Term, 1993

STERLING SUFFOLK RACECOURSE LIMITED PARTNERSHIP,

Petitioner,

v.

BURRILLVILLE RACING ASSOCIATION, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF *AMICI CURIAE* OF KENTUCKY THOROUGHBRED ASSOCIATION, INC., KENTUCKY THOROUGHBRED OWNERS AND BREEDERS, INC. AND THOROUGHBRED OWNERS AND BREEDERS ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a party "especially benefitted" by express statutory rights created under the Interstate Horseracing Act of 1978 has an implied right of action to enforce those rights where there is no indication of a contrary legislative intention but where that party was not included in the express statutory remedy.

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INTEREST OF THE AMICI CURIAE

The Kentucky Thoroughbred Association, Inc. ("KTA") and the Kentucky Thoroughbred Owners and Breeders, Inc. ("KTOB") are two interrelated not for profit organizations which serve as the trade associations representing owners and breeders of Thoroughbred horses in the Commonwealth of Kentucky. In that capacity, the organizations administer state-bred incentive programs, represent Thoroughbred interests at local and state government levels, initiate marketing programs for the breed and generally promote Thoroughbred breeding and racing. By statute, the KTOB has the duty to recommend the Thoroughbred breeders to serve on the Kentucky State Racing Commission. KRS § 230.400(2) Further, KTOB is the sole official registrar of Kentucky Thoroughbred stallions and Kentucky bred Thoroughbreds for purposes of the Kentucky Thoroughbred Development Fund. KRS § 230.400(6)(a). KTA, the sister organization to the KTOB, negotiates on behalf of Thoroughbred owners, breeders and trainers for contracts with the various Kentucky Thoroughbred racetracks. Under contracts with Kentucky's three leading Thoroughbred race tracks (Churchill Downs, Keeneland and Turfway Park), the KTA serves as the Horsemen's Group, an "especially benefitted" party under the Interstate Horseracing Act of 1978 ("IHA").

The Commonwealth of Kentucky is without question the center of the Thoroughbred breeding industry. Likewise, the Thoroughbred racing industry occupies a unique position as the "most prestigious and valued industry" within the Commonwealth of Kentucky. *Chernick v. Fasig-Tipton, Ky., Inc.*, 703 S.W.2d 885, 890

(Ky.Ct.App. 1986). By virtue of Kentucky's preeminent role in the industry, the KTA and the KTOB represent the long-term interests not only of Kentucky owners and breeders but the Thoroughbred industry nationwide. The KTA and the KTOB have a membership base of 1,300 owners, breeders and trainers of Thoroughbred horses in the Commonwealth of Kentucky. Through October of 1993, five of the top ten leading stallions for 1993, including the top two stallions, stood at Claiborne Farm in Paris, Kentucky, whose owners are members of KTA/KTOB, and one of which serves as vice-president and director of KTA/KTOB. Four of the other top ten stallions, for a total of nine out of ten, also stand in Kentucky. The horses, whose owners or stud managers are members of KTA/KTOB, included great racehorses like Secretariat, Affirmed, and Seattle Slew, as well as great stallions like Mr. Prospector, Danzig, Nijinsky II and others. As approximately one-third of Thoroughbreds foaled each year are bred in Kentucky, the membership represents a major voice in the Thoroughbred industry nationwide.

Thoroughbred Owners and Breeders Association, Inc. ("TOBA") is a Delaware, non-profit corporation with its principal office in Lexington, Kentucky. TOBA was formed in 1961 by the merger of two predecessor organizations to promote and protect Thoroughbred racing and breeding and the interests of Thoroughbred horse owners and breeders. Approximately three thousand owners and breeders of Thoroughbred horses throughout the United States are members of TOBA. In addition, thirty-four state associations of owners and breeders are members of TOBA, and the presidents of eight of these state associations (California, Florida, Illinois, Kentucky, New Jersey,

New York, Texas, and Washington) presently serve on TOBA's forty-three member Board of Trustees. These eight State Trustees alone represent approximately ten thousand Thoroughbred breeders and licensed race horse owners in their respective states. TOBA members and the members of its thirty-four state associations form a substantial percentage of the approximately fifty thousand licensed owners of Thoroughbred race horses in the United States. Furthermore, most of the leading money-winning and stakes-winning race horse owners in North America are members of TOBA. The individual interests of TOBA, as well as its members' collective economic interests, in the subject matter of this litigation are very significant.

The members of the three organizations filing this brief are actively involved in the thoroughbred racing industry. Whether breeders, owners, or horsemen, they depend on the economic success of horse racing and breeding for their livelihoods.

ARGUMENT

The IHA is the principal federal statute regulating the horse racing industry. The legislative history of the IHA indicates that Congress was acutely aware of the potentially destructive impact of interstate gambling on horse races. In order to temper that impact, Congress put in place a self-protection mechanism for those with pre-existing economic interests that might be impacted. Instead of establishing a new bureaucracy to administer interstate simulcasting, Congress chose to prohibit

wagering on interstate simulcasts entirely unless consent is obtained from each of five designated entities: the Host Racing Association, the Host Racing Commission, the Horsemen's Group, the Off-Track Racing Commission, and all "currently operating" horseracing tracks within a sixty-mile radius of any proposed off-track betting office. The IHA thereby ensures that the industry itself controls the spread of interstate off-track betting (IOTB). The First Circuit's decision in *Sterling Suffolk Racecourse, Ltd. v. Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir. 1993), eliminates the sixty-mile track approval right and thereby destroys the only federal statutory control against the proliferation of interstate gambling on horse races. Because the vitality of the entire Thoroughbred horse industry is threatened by the First Circuit's decision, this Court should issue a writ of certiorari.

During the early 1980's, other factors, such as tax policy, skewed the relationship between races run and growth of the Thoroughbred foal crop. The more recent data, however, shows a direct correlation between the amount of live racing available and the size of the foal crop. D. Heckerman, *Manes, Tails, Fannies and Bucks*, Thoroughbred Times (Nov. 5, 1993). As a result, the economic health of the breeding industry directly depends on the number of tracks conducting live racing.

The legislative history of the IHA demonstrates IOTB to be an actual not imaginary threat to live racing. Congress considered the examples of New York and France and the impact of IOTB. In each of these two instances, unfettered simulcasting had a drastic effect on the vitality of regional tracks. France was able to maintain its regional tracks only through a series of subsidies. S. Rep.

No. 95-554, 95th Cong. 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 4132-44, at 4135-36. The threat of competition today from IOTB is much greater than it was in 1978, the date of passage for the IHA. The increase nationwide of casino and riverboat gambling along with state-sanctioned lotteries, coupled with the increase of IOTB, has magnified many fold the threat to live racing.

Currently there are some 103 tracks in 30 states that offer live horseracing.[1] Head to head competition with IOTB outlets is particularly threatening to regional, as opposed to national, tracks. These regional tracks do not offer, on a daily basis, racing at the same level as that offered by national tracks. As even a casual observer knows, there are only so many great horses. A horse of Secretariat's calibre runs once in a lifetime; in a given year there are only a few hundred horses competing for racing's largest and most prestigious prizes. Nevertheless, regional tracks offer a quality live product that accounts for some seventy-five percent of the industry. The horses that do not compete in the classics and the owners that cannot afford to compete at that level maintain the viability of the sport on a less grand scale. Interest in major races enhances interest in the local product, and people who attend local tracks are more likely to be interested in major races.

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[1] Significantly, forty-two states have racing commissions indicating a statutory basis for horse racing. At least two states, Minnesota and Alabama, that previously offered significant live racing now offer little or no live racing and have become primarily IOTB outlets. *See American Racing Manual* 452-57, 470-71 (1993).

Moreover, the sheer size of the local market makes it a vital component of the racing industry. These tracks provide a substantial portion of the market for breeders. The success of breeding as an industry depends directly on the number of opportunities for horses to compete. Regional tracks provide a significant number of those opportunities. IOTB outlets pose a particular threat to these venues because a nearby IOTB office can accept wagers on simulcast racing from the national tracks, and can run its operation without the costs that inhere in the daily presentation of live horse racing. The sixty-mile consent provision was intended to allow regional tracks some measure of protection for the environment in which they operate and to insulate the live product from destructive competition from IOTB outlets.[2] While gambling interests prosper as IOTB expands, the horse industry suffers. IOTB outlets make money without horses, by enabling patrons in one state to bet on races being run in another.[3]

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[2] The careful, express limitation of the right to those times when the live racetrack qualifies as "currently operating," *see* 15 U.S.C. § 3002(14), is not anti-competitive in effect.

[3] Thus, an IOTB outlet in Texas within driving distance of Louisiana Downs can accept wagers on races at the nation's premier tracks and offer the racing public the opportunity to wager on those races at the same time that Louisiana Downs offers live racing. Any person who patronizes the IOTB outlet represents lost support for the live racing industry. If the consent provision were enforceable, Louisiana Downs would be able to determine whether it should compete directly with the IOTB outlet – or whether it should withhold its approval in order to safeguard its market and its employees.

In the wake of the First Circuit's decision that the consent provision is unenforceable, no IOTB office will bother to obtain the required consent of sixty-mile tracks prior to accepting a wager on a race at another venue. That decision holds that those tracks have no coercive right against an office that refuses to obtain these consents. The *Sterling* holding directly threatens the economic interests of KTA/KTOB and TOBA. The vitality of racing at regional, as opposed to national, venues depends on the vitality of the IHA's consent provisions. Although Santa Anita or Belmont Park might be able to succeed with IOTB offices next door, it is much harder for a track that conducts racing on a less grand scale and before a more modest audience. These regional tracks provide much of the market for the industry's product, horses, and it is the success of that product on which our members depend. Owners and breeders enjoy derivative protection under the IHA – the sixty-mile consent provision safeguards regional racing and thereby protects the health of the industry. If the First Circuit's opinion shapes behavior in the market, even that derivative protection will disappear. The statute was passed "in order to further the horse racing *and* legal off-track betting industries in the United States." 15 U.S.C. § 3001 (emphasis added). This brief is an effort to highlight that conjunction; the First Circuit read the statute to the exclusive benefit of the betting industry.

In its opinion, the First Circuit interpreted the statute from a distance. Relying on what it termed the "plain meaning of the statute," it held that the Congress had intentionally denied sixty-mile tracks the right to enjoin the acceptance of wagers at IOTB offices that fail to

obtain their consent. This holding is not compelled by the language of the statute and is implausible in light of the economic realities of the horse racing industry. Congress did not enact the statute from the same distance that the First Circuit construed it. When Congress drafted the IHA, it heard testimony from numerous organizations and experts concerning the horse racing industry. Taken in context, the First Circuit's holding is inconsistent with Congress' detailed understanding of the marketplace. More importantly, it raises the specter that the precise danger Congress sought to prevent will come to pass.

Congress was expressly concerned with the continued health of the horse racing industry in the face of the spread of IOTB. "Off track parimutuel wagering on an interstate basis will result in a severe decrease in the number of racetracks." H.R. Rep. No. 94-1366, 94th Cong., 2d Sess. at 1-2 (1976). *Amici* share this concern, and believe that the First Circuit's decision will have dramatic repercussions throughout the horse industry. Any decrease in the number of racetracks poses a severe threat to the industry and the many layers of workers that it encompasses. In addition to the owners and the breeders, racetracks and farms employ countless persons. The care and feeding of horses employs trainers, grooms, exercise riders, outriders, and veterinarians.

Each racetrack supports two layers of employees. In addition to those at the site, the market created by that racetrack helps to support those on the farm where the horses require the same level of care from grooms, riders and veterinarians. The loss of a racetrack reverberates through the industry costing jobs both at that location and at the others that it helps support.

Congress understood the network of dependence that characterizes the industry, and it crafted the IHA so as to minimize the threat posed by IOTB. "[O]ne evil which enactment of [the IHA] will prevent is the proliferation of interstate wagering and the resultant demise of racing." *Interstate Horseracing Act: Hearings Before the Senate Comm. on Commerce*, 95th Cong., 1st Sess. 17 (1977) (Statement of Senator Huddleston). Viewed through this lens, the central importance of the sixty-mile track approval provision appears. It is the only section of the IHA that protects against the threat posed by IOTB. 15 U.S.C. § 3004(b). Every other party with approval rights has a financial incentive to continue simulcasting that competes with the "currently operating track." The host entities make money through simulcasting and are not threatened by the acceptance of wagers in another state. They are insulated by distance. The racing commission stands to prosper from increased tax revenues generated from the money wagered at the IOTB. Indeed, the demise of a track in a neighboring state could be in the best interests of the other state's racing commission. Although these entities have coercive enforcement authority, not one of them has any reason to act to protect a regional racetrack's live product. Only the sixty-mile track has any economic incentive to protect itself, and to protect racing. As a result, the First Circuit has disempowered the one entity with whose interest the Congress was expressly concerned.

The decisions of this Court demand that in considering whether to infer a cause of action in favor of a party, courts must consider the circumstances of the statute's enactment. *See Transamerica Mortgage Advisors, Inc. v.*

Lewis, 444 U.S. 11, 18 (1979). Here, the circumstances that led to the enactment of the IHA strongly favor the enforceability of the petitioner's right. When first introduced in Congress, the bill that became the IHA banned the acceptance of interstate wagers on horse racing. *See Report of the House Committee on Interstate and Foreign Commerce*, H.R. Rep. No. 94-1366, 94th Cong., 2d Sess. at 1-2 (1976). In 1978, after much lobbying and negotiation, Congress passed the IHA. As enacted, the IHA prohibited the acceptance of interstate wagers *unless* its conditions were fulfilled. *See* 15 U.S.C. § 3003 ("No person may accept an interstate off-track wager *except* as provided in this chapter."). The statute requires all five enumerated consents. The First Circuit's decision allows the acceptance of an interstate off-track wager that does not comply with the statute. Thus, it permits the unimpeded spread of IOTB.

Amici believe that IOTB outlets will take the First Circuit's decision as a license to evade the IHA's consent requirements. A recent decision in Kentucky, *KHBPA v. Turfway Park Racing Association*, 1993 U.S.Dist.Lexis 13164 (E.D.Ky. Sept. 20, 1993), increases this likelihood. In that case, the district court held the IHA unconstitutional as applied on First Amendment and vagueness grounds. At the moment, courts have told betting interests that the IHA is no barrier to their spread. *Amici* rely on the vitality of the sixty-mile consent provisions to protect their interests. If those provisions are not enforceable, then they provide no protection at all. Because Congress was expressly concerned with the interests that *amici* represent, this Court should grant the requested writ. The current proliferation of gambling in general and IOTB in particular makes this case one that warrants review now,

as opposed to later. The interpretive questions raised by the petition have real consequences, and those real consequences should compel review here.

SUMMARY OF THE ARGUMENT

The continued vitality of small regional racetracks is integral to the continued vitality of the Thoroughbred industry. Congress, in enacting the IHA, recognized the potentially destructive impact IOTB could have on the economic viability of small racetracks. With that in mind, Congress enacted a system whereby certain consents are necessary in order for an entity to conduct IOTB. By effectively eliminating the necessity to obtain the consent of racetracks within sixty miles of the IOTB site, the First Circuit in its decision in *Sterling* upsets the careful balance crafted by Congress in drafting the IHA.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue.

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